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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (4), if its hostility to certain employees' protected concerted activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge those employees, and the employer cannot establish by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employees' protected activities.

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Statute:

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v.

UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-29a) is reported at 706 F.2d 972. The decision and order of the National Labor Relations Board (App. C, *infra*, 34a-40a) and the decision of the administrative law judge (App. C, *infra*, 41a-87a) are reported at 261 N.L.R.B. 1012.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 30a-33a) was entered on May 17, 1983. On August 5, 1983, Justice White extended the time for

filing a petition for a writ of certiorari to and including September 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this [Act];
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act];
>
> * * * * *

STATEMENT

1. a. Robert Bowlds began work in 1965 at respondent's Owensboro, Kentucky terminal as a feeder driver transporting packages to and from respondent's Nashville, Tennessee terminal. Bowlds was active in various efforts to improve working conditions at respondent's terminals. He served as a Teamsters steward at the Owensboro terminal,[1] filed numerous grievances, and participated in many grievance hearings. Beginning in 1976 and 1977, respectively, Bowlds distributed literature from two organizations, UPSurge and PROD,[2] on a regular basis at the Owensboro terminal. In March 1977, Bowlds initiated a class action suit against respondent, alleging that it had violated a Kentucky statute requiring certain rest breaks. In connection with the suit, Bowlds solicited drivers to join as plaintiffs and to contribute funds for attorney's fees. App. C, *infra*, 43a, 46a-47a.

On April 24, 1978, respondent discharged Bowlds, allegedly because he had taken excessive breaks from his work and falsified his timecards. Following a contractual grievance proceeding, a grievance panel ordered respondent to reduce Bowlds' discharge to a suspension and to reinstate him. On May 24, 1978, respondent gave Bowlds a final warning, allegedly for

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[1] During the relevant period, Teamsters Local 89, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America represented respondent's drivers (App. C, *infra*, 42a, 46a n.1).

[2] UPSurge is a nationwide organization of respondent's employees dedicated to improving working conditions. PROD is an organization of Teamsters members with a similar goal. App. A, *infra*, 2a-3a; App. C, *infra*, 47a.

taking excessive breaks. App. A, *infra*, 3a-4a; App. C, *infra*, 45a-46a. Following another grievance proceeding, respondent was required to rescind the warning. On August 4, 1978, respondent discharged Bowlds for a second time, again claiming that he had overextended his breaks and falsified his timecards. A grievance panel later reduced the discharge to a suspension and final warning. App. A, *infra*, 3a-4a; App. C, *infra*, 46a. Bowlds filed a charge with the National Labor Relations Board concerning the May 24 warning and the August 4 discharge, and the Board's General Counsel filed a complaint based on the charge. The Board, upheld by the Sixth Circuit, found that the warning and discharge were motivated by Bowlds' exercise of protected activity and thus violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1). The Board awarded back pay to Bowlds and ordered respondent, *inter alia*, to rescind the warning notice. *United Parcel Service, Inc.*, 252 N.L.R.B. 1015 (1980), enforced, 677 F.2d 421 (6th Cir. 1982).

In August 1979, while the 1978 unfair labor practice proceedings were pending before the Board, respondent again discharged Bowlds. In July and August of 1979, respondent allegedly became concerned again about Bowlds' late arrivals and had him followed during a run on August 27-28. Respondent claimed that Bowlds had overextended his rest breaks on that trip by 43 minutes and had falsified his timecard. It suspended Bowlds on August 28 and discharged him on August 31. A grievance panel eventually upheld the discharge. App. C, *infra*, 49a-56a.

b. David Perkins began work at respondent's Campbellsville, Kentucky terminal in 1971. Perkins

transported packages from Campbellsville to the Nashville, Tennessee terminal. On return trips he drove from Nashville to an intermediate stop at respondent's Bowling Green, Kentucky terminal and then returned to the Campbellsville terminal. App. C, *infra*, 56a.

Beginning in October 1976, Perkins solicited employee contributions and signatures in support of Bowlds' class action regarding rest breaks. In 1979, Perkins testified in support of Bowlds at the unfair labor practice hearing before the Board (see page 4, *supra*). On several occasions Perkins distributed UPSurge or PROD literature at the Campbellsville terminal. App. C, *infra*, 59a. Terminal Manager Mouser warned Perkins not to distribute such literature (*ibid.*). On February 14, 1979, Perkins filed a grievance alleging that respondent had failed to assign him sufficient work; the grievance was resolved against Perkins (App. A, *infra*, 5a). Later that month, Perkins asked Terminal Manager Mouser for additional trousers to complete his company-issued uniform. Mouser refused, stating: "Perkins, we're trying to figure out a way to fire your ass anyway. We won't have to get you any [trousers]." *Ibid.*

Respondent suspended Perkins on August 28 and discharged him on August 30, 1979. Respondent claimed that on the night shift of August 27-28, 1979, Perkins overextended his rest breaks and falsified his timecard while driving between the Campbellsville and Nashville terminals. A grievance panel later ordered Perkins reinstated without backpay. App. C, *infra*, 58a, 61a-62a.

2. The Board, affirming the decision of the administrative law judge ("ALJ"), found that protected activity by Bowlds and Perkins was the motivating

cause of their discharges and that respondent therefore violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4).[3] App. C, *infra*, 34a-87a. The ALJ found that the General Counsel had established that protected activity was the motivating factor in the discharges of Bowlds and Perkins and that respondent had "failed to demonstrate that such actions would have taken place in the absence of the protected conduct" (*id.* at 81a).

In rejecting respondent's contention that Bowlds and Perkins were discharged because of alleged excessive breaks and falsified timecards, the ALJ noted that the two employees were subjected to extraordinary surveillance at a time when they were known to have been engaged in protected concerted activity and that both employees appeared to have satisfactory records of punctuality (App. C, *infra*, 74a-81a). He further found that respondent's allegation that

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[3] The ALJ rejected respondent's contention that the Board should defer to the grievance awards that had sustained Bowlds' discharge and had ordered Perkins reinstated without backpay. The ALJ concluded that deferral would be unwarranted because the unfair labor practice issue had not been presented to, or decided by, the grievance panels. App. C, *infra*, 67a-69a. The court of appeals concluded that the Board did not abuse its discretion in refusing to defer to the grievance panels (App. A, *infra*, 18a-21a). On July 15, 1983, respondent petitioned for a writ of certiorari on the issue of the Board's refusal to defer to the grievance panels (No. 83-71). We are addressing the issues raised in No. 83-71 in a separate filing.

The Board also found that respondent violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule that prohibited distribution of UPSurge literature by employees during nonworking time (App. C, *infra*, 35a n.3). The court of appeals upheld this finding (App. A, *infra*, 11a-16a), and no issue concerning it is raised here.

Bowlds and Perkins had overstayed rest stops and falsified their timecards was contradicted by the record evidence and that Perkins' late arrival at the conclusion of his run was the result of delayed departures that were not his fault (*id.* at 77a, 80a-81a).

3. The court of appeals affirmed (App. A, *infra*, 1a-29a). It concluded that the General Counsel had presented sufficient evidence to support the inference that protected conduct was a motivating factor in respondent's decision to discharge Bowlds and Perkins. The court stated (*id.* at 23a; footnote omitted):

> The General Counsel produced evidence that UPS knew that Bowlds and Perkins were involved in widespread protected activity, including organizing efforts for UPSurge. The General Counsel also presented evidence that Bowlds and Perkins, at the time of their discharges, were involved in another unfair labor practice proceeding concerning alleged discrimination for union activity. Bowlds and Perkins both testified that, contrary to reports by UPS's supervisors, they did not overextend their breaks on the night of August 27-28. Evidence corroborating their testimony was introduced by the General Counsel.

However, the court of appeals refused to enforce the Board's order, relying on its earlier decisions in *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 90 (3d Cir. 1982), vacated and remanded, No. 82-438 (June 20, 1983), enforced after remand, No. 81-1937 (3d Cir. Aug. 17, 1983), and *NLRB* v. *Blackstone Co.*, 685 F.2d 102, 104-106 (3d Cir. 1982), vacated and remanded, No. 82-1105 (June 20, 1983), enforced after remand, No. 81-3132 (3d Cir. Sept. 7, 1983). In *Behring* and *Blackstone*, the court of ap-

peals had rejected the Board's *Wright Line* allocation of the burden of proof in dual motive cases. In *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the Board had explained that, in determining whether an employer's action violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled that the employer nevertheless could avoid an unfair labor practice finding if it proved, by a preponderance of the evidence, that it would have taken the adverse action even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089. In the court's view, the Board "misallocated the burden of persuasion" by "shift[ing] to UPS the burden of proving that the discharges would have taken place in the absence of any protected conduct" (App. A, *infra*, 25a). Accordingly, the court remanded the case to the Board for application of an alternative burden-shifting test it had prescribed in *Behring* and *Blackstone* (App. A, *infra*, 25a-26a).

REASONS FOR GRANTING THE PETITION

The court of appeals concluded that this case should be remanded to the Board because the court disagreed with the Board's allocation of the burden of proof in dual motive cases, set out in *Wright Line, a Division of Wright Line, Inc.*, *supra*. This Court recently upheld the Board's *Wright Line* allocation in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983). Soon thereafter, the Court vacated the

judgments in *Behring International* v. *NLRB*, *supra*, and *NLRB* v. *Blackstone Co.*, *supra*, on which the court below relied in this case, and remanded for further consideration in light of the decision in *Transportation Management*. *NLRB* v. *Behring International, Inc.*, No. 82-438 (June 20, 1983); *NLRB* v. *Blackstone Co.*, No. 82-1105 (June 20, 1983).

Because the court of appeals relied on a view of the law that this Court subsequently found to be erroneous, its judgment should be vacated and the case should be remanded to the court of appeals for further consideration in light of the Court's decision in *Transportation Management*. This disposition would be consistent with the Court's prior disposition of the petitions in *Behring International* and *Blackstone Co.*[4]

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[4] On June 24, 1983, the Board filed a motion to vacate judgment in light of *Transportation Management* in the court of appeals. The court of appeals has not yet acted on that motion, and it appears to be deferring consideration of the motion pending this Court's disposition of respondent's petition for a writ of certiorari in No. 83-71. If the court of appeals should afford appropriate relief in the meantime, we will notify the Court and withdraw this petition.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further consideration in light of *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983).

Respectfully submitted.

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National Labor Relations Board

SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3318

UNITED PARCEL SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW
NATIONAL LABOR RELATIONS BOARD
Board Nos. 25-CA-11313 & 25-CA-11313-2

Argued February 15, 1983

Before: GIBBONS, HUNTER and ROSENN,
Circuit Judges

Opinion Filed April 18, 1983

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On May 21, 1982, the National Labor Relations Board ("Board") issued a decision and order holding that United Parcel Service, Inc. ("UPS") had com-

mitted certain unfair labor practices under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981) ("Act"). The Board held that UPS had violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976), by promulgating, maintaining, and enforcing an unlawfully broad no-distribution of literature rule. It also held that UPS had violated sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act, 29 U.S.C. § 158(a)(1), (a)(3), (a)(4) (1976), by unlawfully discharging Robert W. Bowlds and David E. Perkins, two UPS employees.

2. This action is a petition for review and a cross-application for enforcement of that order. For the reasons stated herein we will enforce in part, and we will remand in part.

I

A. *Driver Robert Bowlds*

3. Bowlds was originally hired by UPS in 1965. For the six or seven years prior to the instant unfair labor proceeding, he worked as a "feeder driver" out of UPS's Owensboro, Kentucky facility.[1] Bowlds also served as the Teamsters Local 89 steward at the Owensboro terminal.[2] In his position as steward Bowlds filed grievances, participated in grievance hearings, and assisted the Professional Drivers Council

[1] As part of its operations, UPS employs feeder drivers who drive fixed delivery routes between UPS facilities. Those drivers operate out of a home location and shuttle packages to and from specific distribution depots. At those distribution points the packages are resorted and then loaded on to other UPS trucks for further delivery.

[2] At all times relevant to this action, Teamsters Local 89 was the exclusive bargaining agent for the Company's employees. App. at 142a n.1.

("PROD"), a Teamsters' organization. Since 1975 Bowlds had also been a member of "UPSurge," a nationwide organization of UPS employees dedicated to improving their wages, hours, and working conditions. Bowlds testified that he had been openly involved with both UPSurge and PROD at the Owensboro terminal [3] and had distributed their literature in the presence of UPS supervisors. App. at 413a-15a, 419a-23a.[4]

4. Bowlds had a running history of disputes with UPS. On April 24, 1978, UPS discharged Bowlds, assertedly because he falsified his timecard and overextended his rest breaks.[5] On May 8, 1978, as a reresult of a contractual grievance proceeding, Bowlds was reinstated, and the discharge was converted into a suspension. On May 24, 1978, Bowlds was issued a "final warning" for taking excessive time on his breaks. That warning was rescinded on June 14, 1978, also after a grievance proceeding. On August 4, 1978, UPS discharged Bowlds for a second time, again asserting that he had overextended his breaks

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[3] In the instant case the ALJ found that employee activity on behalf of PROD and UPSurge constituted concerted protected activity under the Act. App. at 143a.

[4] In addition in March of 1977, Bowlds initiated a class action suit against UPS alleging that UPS had violated a Kentucky statute requiring employers to grant periodic ten-minute rest breaks.

[5] For UPS's distribution systems to function properly, all feeder drivers must keep to a preset schedule. Departure times, rest stops, and arrival times are all predetermined to ensure the continuous and efficient flow of packages from terminal to terminal. Company policy requires that a driver's timecard accurately reflect the amount of time that he spends on the road and on his breaks. App. at 832a-36a; *see* app. at 145a n.4, 158a n.16; 366a-68a, 408a-10a, 980a-81a.

and falsified his timecard. On October 3, 1978, a grievance panel reduced the discharge to a "Disciplinary Suspension and Final Warning."

5. Both the May 24, 1978 final warning letter and the August 4, 1978 discharge were the subject of an unfair labor practice proceeding brought by the General Counsel against UPS. The Board held that those actions violated sections 8(a)(1) and 8(a)(3) the Act. *United Parcel Service, Inc.*, 252 N.L.R.B. 1015, 1019 (1980), *enforced*, 677 F.2d 421 (6th Cir. 1982) (*"United Parcel Service I"*).[6] The Board issued a cease and desist order, awarded Bowlds back pay, and ordered the May 24, 1978 warning letter expunged from his file. *United Parcel Service I*, 252 N.L.R.B. at 1016, 1023.

6. UPS claims that in July and August of 1979 it again became concerned about Bowlds' consistent late arrival at the Owensboro Center. The Company decided to observe Bowlds on the night of August 27-28 during one of his normally scheduled runs.[7] According to the supervisors who trailed him, Bowlds overstayed his allotted rest periods on that run by forty-three minutes. On the next night the Company suspended Bowlds allegedly for overextending his breaks and

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[6] In its decision the Board noted several instances where Company supervisors indicated shortly after the issuance of the May 24, 1978 warning letter that they were going to "get" Bowlds. *United Parcel Service I*, 252 N.L.R.B. at 1021.

[7] UPS has a policy of putting under observation drivers who are suspected of excessive delays. In the past ten years several feeder drivers have been placed under observation for allegedly overstaying their rest breaks. A driver will not be put under observation, however, until the situation has been discussed between the driver and his supervisor and until after the driver has had an opportunity to remedy the problem. App. at 144a & n.3; 864a-66a.

falsifying his timecard. Three days later UPS informed Bowlds that he was discharged.

B. *Driver David Perkins*

7. Perkins has been employed at UPS's Campbellsville, Kentucky facility as a feeder driver since 1971 and, like Bowlds, has actively been involved with union activity. He testified that he had openly distributed UPSurge and PROD material at Campbellsville several times, and that he had collected money and solicited signatures for the class action suit brought by Bowlds against UPS.

8. On February 14, 1979, Perkins filed a grievance protesting UPS's alleged failure to assign him sufficient work. That grievance was resolved against him. App. at 90a; 648a-50a. Perkins testified that two weeks later he had a conversation with Tom Mouser, the Campbellsville Terminal Manager, about obtaining some work pants. According to Perkins, Mouser stated: "Perkins, we're trying to figure out a way to fire your ass anyway. We won't have to get you any." App. at 652a. That statement was made in front of two other employees, Bobby Pierce and Eddy O'Banion, who both corroborated Perkins' version of events. App. at 150a; 224a-25a, 234a-35a, 652a-53a.

9. Perkins also stated that in February or March of 1979, Mouser approached him at the Campbellsville facility and brought up the subject of UPSurge. He testified:

> [Mouser] asked me if I had been distributing some papers around Campbellsville, and I said yes. And I told him we had the right to as long as the man wasn't on the clock working.
>
> And he repsonded, "Well, I'd rather you didn't do it."

App. at 643a. At the time Mouser made his statement, Perkins was not distributing literature. Perkins testified that despite Mouser's statement, he continued to distribute UPSurge material at least two more times over the next few months. App. at 644a-45a.

10. UPS contends that throughout the summer of 1979, Perkins habitually returned late to Campbellsville after completing his regularly scheduled route. In conjunction with its observation of Bowlds, UPS decided to observe Perkins on the night of August 27-28. Company supervisors testified that they followed Perkins to a rest stop where they observed him overstay his rest break. On the next evening Perkins' supervisor told him that he was suspended for overextending his rest break and falsifying his timecard. On August 30, 1979, Perkins was formally told that he was being discharged.

C. *The Grievance Proceedings*

11. Both Bowlds and Perkins filed grievances over their discharges under the grievance procedures in their union contract. An initial meeting was held on Bowlds' grievance on September 11, 1979. Bowlds' grievance was read into the record,[8] and Bowlds stated

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[8] Bowlds' grievance states [sic]:

> On Aug 28th I was called to work early at 7:00 PM and told by Ben Cissel that I was suspended for overextending my break and falsifying a time card. Cissel said he could not give me the details and date therefore denying me a chance to prove myself innocent. I[t] was not until Aug 31st at 9:00 AM that I was told that I was terminated and questioned about my 15 min. breaks the night of Aug 27th. I think the Company withheld the details of this charge against me as long as possible to make it harder to defend myself. I did not overextend my break or

that he was innocent of the UPS's charges. UPS presented testimony supporting its claim that Bowlds had overextended his breaks and falsified his time card. The panel deadlocked, and the grievance was referred to the state level. The grievance was heard before the state panel on October 9, 1979, but the parties again deadlocked. On October 30, 1979, the Joint Area Conference heard Bowlds' grievance but the parties again were unable to resolve the dispute. Finally on November 20, 1979, the grievance was placed on the Joint Area Conference's "Deadlocked Agenda," and after a hearing Bowlds' discharge was upheld.

12. Perkins' grievance was also initially heard on September 11, 1979. A UPS supervisor testified that Perkins had been observed taking a thirty-two minute break although his timecard only reflected a fifteen

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falsify. Anytime I stoped my truck, *other than* the 15 minute break shown on my card, was because I was very sleepy and had to pull off the road long enough to get myself woke up so I would not have an accident. Although I could get myself awake and alert for short periods I continued to be sleepy & drowsy, the rest of the night. I have not been late with my load nor have I ever missed a scheduled days work.

But once again I think I was terminated for my union activities, union related activities and my direct involvement in the class action suit to get the company to comply with state law on 10 minutes Rest Periods. I think the company singled me out to build a case against me in the NLRB hearing set for Sept 11th.

I ask the Union treat me equal to all the other feeder drivers and see the Company has not. I ask that I be reinstated fully with pay for all time lost, and be allowed to do an honest and dependable job.

App. 120a-21a (emphasis in original).

minute break. Perkins' grievance was read,[9] and two affidavits were submitted in his defense. The hearing was deadlocked, and Perkins' grievance was referred to the state level. After a hearing before the state panel, Perkins was granted immediate reinstatement without backpay.

II

13. Following their discharges both Bowlds and Perkins filed charges with the Board's Regional Director claiming that UPS had unlawfully discriminated against them because of their protected activities. On October 24, 1979, the Regional Director issued a consolidated complaint charging UPS with unfair labor practices. The complaint alleged that UPS had violated section 8(a)(1) of the Act by unlawfully promulgating and enforcing a rule prohibiting distribution of UPSurge's written material on UPS property.[10] Order Consolidating Cases, Con-

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[9] Perkins grievance states:

> On the night of Aug. 28, 1979 I was suspended for aledgedly extending my brake and falsifying my time card. I was given no time or dates of this occurance to defend myself. On Aug. 30, 1979 I was called to work at my regular start time only to be fired for the above acuations. They did not have the exact times they recorded me but only the length I was there which was 32 minutes and a lie.
>
> The above charges are degrading and have damaged my Employment Record. I want to be compensated for all time off and all documents of this occurance stricken from my records.

App. at 86a.

[10] Employees have the right to distribute union literature in nonworking areas of the employer's premises during nonwork periods. Employers may not interfere with that right except

solidated Complaint and Notice of Hearing ¶5, 9, 11, app. at 3a, 4a. It also alleged that UPS had violated sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act by unlawfully discharging Bowlds and Perkins. *Id.* at ¶6, 7, 8, 9, 11, app. at 3a, 4a.

14. An Administrative Law Judge held hearings and issued a decision on October 3, 1980. He initially determined that the General Counsel's complaint should not be dismissed on *Spielberg* deferral grounds.[11] Turning to the merits he found that in February and March of 1979, UPS had promulgated, maintained, and enforced an "ambiguous" written rule prohibiting distribution of literature on UPS property at any time. The ALJ found that Mouser enforced this rule, pointing specifically to Mouser's statement of "I'd rather you didn't do it," made to Perkins concerning the distribution of UPSurge material. App. at 156a-57a.[12] Based on these facts the ALJ held that UPS had violated section 8(a)(1) of the Act.

15. Turning to the discharges of Bowlds and Perkins, the ALJ found not credible the supervisors' tes-

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to the extent necessary to maintain production or discipline. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 570-75 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-05 (1945).

[11] *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

[12] Mouser denied that he ever made that statement, but the ALJ found him not to be a credible witness. Both the Board and this court are generally bound by credibility determinations made by the ALJ. *See Behring International, Inc. v. NLRB*, 675 F.2d 83, 86 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3199 (U.S. Sept. 13, 1982) (No. 82-438); *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951).

timony that Bowlds and Perkins had overextended their breaks. App. at 160a, 162a. He determined that, as a general matter, late returns by Bowlds and Perkins were due to delays in getting out of other terminals. *Id.* The ALJ also found that Bowlds and Perkins had been singled out for "extraordinary surveillance" because of their union activity. *Id.* While the ALJ did find some discrepancies on the two employees' timecards, he held that they were of a "minor nature." App. at 162a. The ALJ concluded:

> In the instant case, I have found that the General Counsel made a *prima facie* showing sufficient to support the inference that protected conduct was the motivating factor in the suspension and discharges of Bowlds and Perkins, and in my view the Respondent has failed to demonstrate that such actions would have taken place in the absence of the protected conduct. In accordance therewith, the Respondent is in violation of sections 8(a)(1), (3), and (4) of the Act.

App. at 163a.

16. UPS filed exceptions to the ALJ's decision on December 12, 1980. On May 21, 1982, the Board issued a decision and order adopting the findings and conclusions of the ALJ. *United Parcel Service, Inc.*, 261 N.L.R.B. No. 134 (1982) (*"United Parcel Service II"*). The Board, however, slightly changed the basis for its finding of an 8(a)(1) violation.

> In affirming the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by promulgating, maintaining, and enforcing an unlawfully broad no-distribution

> rule, we refer solely to the implied restrictions against distribution on nonworking time which Supervisor Mouser communicated to employee Perkins in a February or March 1979 conversation. We find no need to decide whether Respondent's written no-solicitation, no distribution rules also violated Sec. 8(a)(1).

Id. at 2 n.3. The Board specifically upheld the ALJ's "broad" remedial order that the Company cease and desist "in any like or related manner" from interfering with employees' section 7 rights. The Board found that the award was warranted because "Respondent has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for the employee's fundamental Sec.7 rights." *Id.* at 2 n.4; *see NLRB v. Local 483 and Local 11*, 672 F.2d 1159, 1168 (3d Cir. 1982).

17. UPS filed a petition to review the Board's decision on July 8, 1982. The Board filed a cross-application for enforcement on August 17, 1982.

III

A. *The Section 8(a)(1) Violation—Distribution of UPSurge Literature*

18. UPS contends that we should not enforce the Board's order holding that UPS violated section 8(a)(1) of the Act. First UPS asserts that Mouser's statement, relied upon by the Board for its finding of a section 8(a)(1) violation, was not part of the General Counsel's consolidated complaint nor the basis for the ALJ's decision. UPS claims that the Board's "eleventh hour modification" of the issue prejudiced it from properly asserting a defense to the Board's

charges because at the evidentiary hearings it focused its efforts on disproving the alleged written policy rather than on rebutting any alleged individual coercion by Mouser. The Board claims that UPS did have adequate notice of the charges against it. It argues that paragraphs 5(c) and 9 of the consolidated complaint [13] adequately informed UPS of the

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[13] Paragraph 5 of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing reads:

> (a) On or about an unknown date in March, 1979, the Respondent at its facility promulgated and since said date has maintained the following rule:
>
> No distribution of UPSurge written material on the Respondent's property at any time.
>
> (b) The Respondent promulgated the rule described above in subparagraph 5(a) in order to discourage its employees from joining, supporting or assisting UPSurge, an organization of employees which is designed to inform and influence the Respondent's employees concerning the actions and policies of the Respondent and Teamsters Local 710 and Teamsters Local 89 with respect to wages, hours, and working conditions.
>
> (c) *On or about an unknown date in March, 1979, the Respondent by its officer and agent Tom Mouser, maintained and enforced the rule described above in subparagraph 5(a) by prohibiting its employees from passing out UPSurge materials at anytime while they were on company property.*

Paragraph 9 reads:

> By the acts described above in paragraph 5 through 8, *and by each of said acts,* the Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

App. at 2a-4a (emphasis added).

allegation that Mouser's statement violated the Act.

19. Both the Administrative Procedure Act and the Board's own rules require that a complaint properly inform a charged party of any asserted violation. 5 U.S.C. § 544(b)(3)(1976); 29 C.F.R. § 102.15 (1982).[14] "The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *George Banta Co. v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1982) (quoting *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981) (citing cases)), *petition for cert. filed*, 51 U.S.L.W. 3554 (U.S. Jan. 10, 1983) No. 82-1162); *see Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1073-75 (1st Cir. 1981). Even where evidence supporting a remedial order is in the record, courts have refused to grant enforcement of a Board order in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue before the ALJ. *See, e.g., Blake* 663 F.2d at 279; *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763-64 (8th Cir. 1967).

20. Although the thrust of the original complaint was that UPS's written policy violated the Act, it specifically referred to the actions Mouser took in March of 1979 to enforce the no-distribution rule. More importantly, UPS had a meaningful opportunity to litigate the issue of whether Mouser actually made the alleged statement or, if made, whether the

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[14] General principles of due process also require that persons charged with unlawful conduct be given prior notice of the charges and an opportunity to be heard in defense before the Government can taken enforcement action. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1182 (5th Cir. 1982); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981).

statement was coercive. On direct examination by UPS, Mouser specifically denied that he had ever made the disputed statement to Perkins. App. at 1015a-16a. In reaching its conclusions, the Board merely accepted the ALJ's findings crediting Perkins' testimony over Mouser's. *United Parcel Service II*, 261 N.L.R.B. No. 134, at 2 n.2; *see* app. at 156 n.14. Based on this record we find that UPS had sufficient notice about Mouser's statement to defend adequately the charge that that statement constituted a section 8(a)(1) violation under the Act and therefore was not unduly prejudiced by the Board's holding, *cf. Soule*, 652 F.2d at 1074 (test is one of fairness under the circumstances of each case).

21. UPS's second argument against enforcement is that the Board's conclusion that Mouser's statement violated section 8(a)(1) of the Act is not supported by substantial evidence. UPS asserts that Mouser's "innocuous" statement should not be considered coercive because the utterance was extremely short and because there is no evidence that it was made in a threatening tone.

22. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title." 29 U.S.C. § 158(a)(1) (1976). To establish a violation of that section, "it need only be shown that "*under the circumstances existing*, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" *United States Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982) (emphasis added) (quoting *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 242 (3d Cir. 1976) (quoting *Local 542 v. NLRB*, 328 F.2d 850, 852-53

(3d Cir.), *cert. denied*, 379 U.S. 826 (1964)); *see NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 259-60 (3d Cir. 1982) (en banc). Our standard of review is whether there is substantial evidence on the record as a whole, including any evidence detracting from the Board's view, to support the Board's finding of a violation. *Universal Camera Corp. v. NLRB*, 340 474, 488 (1951); *United States Steel Corp.*, 682 F.2d at 101.

23. In affirming the ALJ's determination that UPS violated section 8(a)(1) of the Act, the Board relied solely on Mouser's statement to Perkins that he would "rather not" have Perkins distribute literature. 261 N.L.R.B. No. 134, at 2 n.3. We have recently held that where an incident of alleged interference with the distribution of literature is trivial and isolated and only imposes a negligible burden on employees' rights, it will not rise to the level of a violation of the Act. *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 542 (3d Cir. 1983). The Board argues that Mouser's statement is not an isolated comment but rather part of a long-standing pattern of restraining the distribution of literature during nonworking time. It asserts that when Mouser's statement is examined against the "backdrop of . . . hostility" to section 7 rights, it should be considered coercive and therefore violative of the Act.

24. Viewing all the circumstances, we hold that substantial evidence exists in the record to uphold the Board's finding of a section 8(a)(1) violation. It is true that Mouser's statement, on its face, could be considered noncoercive. Perkins, however, had recently filed a grievance against Mouser and UPS. App. at 648a-50a; *see* app. at 90a. On February 28,

1979, in the presence of two other employees, Mouser said to Perkins "we're trying to figure out a way to fire your ass." App. at 150a; 652a. The ALJ took official notice that the Board had previously determined that UPS and its supervisors had engaged in various unfair labor practices, in connection with UPS's opposition to employee involvement with UPSurge. App. at 142a-43a. In light of these facts we think that the record supports the Board's finding that Mouser's statement tended to impose unlawful restrictions on Perkins' right to distribute literature.[15] Accordingly, we affirm the Board's holding that the statement violated section 8(a)(1).[16]

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[15] We agree with the ALJ's statement that "the mere fact that the tone of the conversation may have been friendly or conciliatory does not, of course, erase the implied restrictions by Mouser." App. at 157a.

[16] In its opening brief and in its reply brief, UPS raised a third argument against enforcing the Board's order. It asserted that the Board's "re-characterization" of the § 8(a)(1) violation presented a statute of limitations problem under § 10(b) of the Act, 29 U.S.C. § 160(b) (1976), because Mouser's alleged statement occurred more than six months prior to the filing of the unfair labor practice charge.

On December 6, 1982, the Board filed a motion to strike UPS's statute of limitations defense because it had not been properly presented to the Board. *See* 29 U.S.C. § 160(e) (1976). In response to the Board's motion, UPS argues that it did raise the issue, pointing to one sentence in its brief submitted in support of its exceptions to the ALJ's decision. The Board's regulations, however, state that a matter must be included in a party's *exceptions* before it will be considered by the Board. *See* 29 C.F.R. § 102.46 (1982); *see also* 29 C.F.R. § 102.34(b) (brief filed in support of exceptions not included in record of case). UPS concedes that it did not raise the issue in its formal exceptions, and thus under § 10(e) of the

B. *The Section 8(a)(1), 8(a)(3), and 8(a)(4) Violations—The Discharges of Bowlds and Perkins*

25. UPS urges us to reject the Board's conclusion that the discharges of Bowlds and Perkins violated sections 8(a)(1), 8(a)(3),[17] and 8(a)(4)[18] of the

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Act and the Board's regulations, it is barred from raising that issue before us.

UPS further argues that even if it did not meet the requirements of § 10(e), it should not be precluded from raising the statute of limitations issue because "the issue was not interjected into the litigation until the NRLB's final order." *Cf. NLRB v. Richards*, 265 F.2d 855, 862 (3d Cir. 1959) (party not barred from raising before court issue of law initially created by the Board's order). The ALJ's holding, however, specifically based the § 8(a)(1) violation on activity in February and March of 1979. App. at 157a. Thus the statute of limitations issue could have been raised by UPS before the Board in response to the ALJ's finding of when a violation occurred. UPS's failure to raise that issue before the Board precludes our review at this stage.

[17] Section 8(a)(3) of the Act states:

> It shall be an unfair labor practice for an employer—
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

29 U.S.C. § 158(a)(3) (1976).

[18] Section 8(a)(4) of the Act states:

> It shall be an unfair labor practice for an employer—
>
> . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

29 U.S.C. § 158(a)(4) (1976).

Act. First, it argues that the Board abused its discretion by refusing to defer to the grievance panel decisions concerning the discharges of Bowlds and Perkins. Second, it argues that if we find that the Board properly exercised its jurisdiction, we should not enforce the Board's order because the General Counsel failed to meet its threshold burden of establishing a *prima facie* case of unlawful discrimination. Finally, it argues that, even assuming establishment of a *prima facie* case, the Board's order can not be enforced because the ALJ erroneously shifted to UPS the burden of proving that the discharges were not discriminatory.

1. *Deferral to the Grievance Proceedings*

26. In a series of decisions beginning with *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), the Board has ruled that it will defer to an arbitrator's award if four criteria are met: (1) the proceedings have been fair and regular; (2) the parties agreed to be bound; (3) the decision was not "clearly repugnant" to the purposes and policies of the Act; and (4) the arbitration has decided the statutory issue currently under review, *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146 (1980); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964); *see Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 159-61 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3622 (U.S. Jan. 29, 1982) (No. 81-1438); *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 968-71 (3d Cir. 1981); *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980); *cf. Schaefer v. NLRB*, 697 F.2d 558 (3d Cir. 1983)

(Board deferral to private settlement agreements).[19] The Board's policy of deferral is designed to promote industrial peace and stability by encouraging the private resolution of disputes. *Spielberg*, 112 N.L.R.B. at 1082.[20] In reviewing a Board decision not to defer to an arbitrator's award, we are limited to determining whether the Board abused its discretion, *Herman Brothers, Inc. v. NLRB*, 658 F.2d 201, 207 (3d Cir. 1981); *General Warehouse Corp.*, 643 F.2d at 968 & n.10; *see NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 350 & n.7 (5th Cir. 1982), *petition for*

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[19] The first three parts of the Board's test were originally formulated in *Spielberg*, 112 N.L.R.B. at 1082. The fourth element, actually "a prerequisite to the *Spielberg* standards," *General Warehouse*, 643 F.2d at 969 & n.12, was articulated in *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964), as a separate and distinct factor. *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 735 & n.3 (4th Cir. 1982); *see Professional Porter & Window Cleaning Co.*, 263 N.L.R.B. No. 34 (1982). *See generally NLRB v. Babcock and Wilcox Co.*, 697 F.2d 724 (6th Cir. 1982); *NLRB v. South Cent. Bell Tel. Co.*, 688 F.2d 345 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1016); *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 318 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2236 (1982); *NLRB v. Designcraft Jewel Indus.*, 675 F.2d 493 (2d Cir. 1982); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 22, 1982) (No. 81-2162; Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy*, 42 Ford. L. Rev. 291 (1973); Note, Spielberg *Reconsidered—Problems in Application and Content of the Deferral Doctrine*, 49 Ford. L. Rev. 1116 (1981): Note, *Limiting Deferral Under the* Spielberg *Doctrine*, 67 Va. L. Rev. 615 (1981).

[20] *See William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 270-72 & n.7 (1964); *Hammermill*, 658 F.2d at 159 n.8; *General Warehouse Corp.*, 643 F.2d at 968 n.11.

cert. filed, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1016).

27. In the instant case, no evidence of Bowlds' and Perkins' protected activities was presented at any stage of the grievance proceedings. Tom Trenaman, the Local 89 Business Agent who represented both employees before the grievance panel, admitted that he never met with Bowlds or Perkins before the grievance panel meetings, never went over their testimony with them, and never introduced any evidence concerning their PROD or UPSurge activities. Other than a passing reference in Bowlds' grievance, no mention was made before the panel of the class action lawsuit against UPS, of the other grievances filed by Bowlds or Perkins, or of their previous testimony before the Board.[21] The panel decisions made no refer-

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[21] UPS argues that because Bowlds' grievance mentions his union activities and because it was read into the record at every stage of the proceedings, the grievance panel was sufficiently apprised of the statutory issues to require deference by the Board under *Spielberg*. We have stated:

> The Board's fourth requirement will be deemed met "[i]f there is substantial and definite proof that the unfair labor practice issue and evidence were expressly presented to the arbitrator and [*that*] *the arbitrator's decision indisputably resolve*[*d*] *the* [*unfair labor practice*] *issue*. . . ." *Stephenson*, 550 F.2d at 538 n.4 (emphasis added). If "the arbitrator's decision is ambiguous as to the resolution of the statutory issue, [we must hold that] the 'clearly decided requirement has not been met.'" *Id.*

General Warehouse, 643 F.2d at 969 n.16 (quoting *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977)); *see Hammermill*, 658 F.2d at 160-61. Mere passing reference in Bowlds' grievance to his protected activities is not "substantial and definite proof" that the statutory issue was "indisputably resolve[d]."

We note that the Board's refusal to defer in the instant case is consistent with its treatment of the same issue in *United Parcel Service I*. In that decision the Board stated:

ence to any concerted or protected activities on the part of Bowlds or Perkins.

28. We find that the Board properly exercised its jurisdiction over the unfair labor practice proceedings. We have previously held that "for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided." *General Warehouse*, 643 F.2d at 969 (footnotes omitted). The instant record is devoid of any such evidence. There is nothing to indicate that the statutory issue was fully presented to or considered by the grievance panels.[22] Based on that record, the Board did not abuse its discretion by refusing to defer.[23]

Because the Union's failure both to advocate Bowlds' claim that he was discharged for dissent activities and to present evidence on that claim, we find deferral inappropriate. In these circumstances, it is not enough that Bowlds' grievance was read at each step of the proceeding, even though in the grievance Bowlds contended that he was discharged for his "union activities and involvement in a class action suit. . . ." The mere presentation of the contention, without more, cannot support deferral.

252 N.L.R.B. 1015, 1016 (1980) (footnote omitted). The Sixth Circuit affirmed the Board's ruling on the *Spielberg* issue. *NLRB v. United Parcel Service, Inc.*, 677 F.2d 421, 422 (6th Cir. 1982).

[22] Because the grievance panels did not consider or resolve the unfair labor practice issues, the ALJ and the Board did not have to consider the other *Spielberg* criteria when deciding whether to defer. *General Warehouse*, 643 F.2d at 969; *Professional Porter & Window Cleaning Co.*, 263 N.L.R.B. No. 34, at 5 n.3 (1982). Accordingly we do not reach the Board's other argument that the arbitrator's decision as to Bowlds was "clearly repugnant" to the Act.

[23] UPS argues that the arbitrator's decision to uphold Bowlds' discharge implicitly decided that UPS did not discriminate in

2. *The General Counsel's Prima Facie Case.*

29. UPS contends that even if the Board properly refused to defer to the grievance panel's decision, we should not enforce the Board's order. It asserts that the General Counsel, when presenting his case to the ALJ, failed to meet his threshold burden of making a *prima facie* showing of unlawful discrimination.

30. To establish a *prima facie* case, the General Counsel must present sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision. *Behring International, Inc. v. NLRB*, 675 F.2d 88, 90 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3199 (U.S. Sept. 13, 1982) (No. 82-438). As the Supreme Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981):

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violation of the Act. The collective bargaining agreement explicitly prohibits "any discrimination against any employee because of union membership or activities." App. at 29a. Thus UPS argues that the decision to uphold Bowlds' discharge "necessarily" was a decision holding that the Company had not discriminated against Bowlds because of his protected activity.

While an arbitrator's award may "evince resolution of unfair labor practice issues," *Hammermill*, 658 F.2d at 160, a finding favorable to the employer does not automatically dispose of a claim of discriminatory discharge in violation of the Act. *Id.*; *General Warehouse*, 643 F.2d at 969 & n.13. When *no* evidence of protected activity is presented to the arbitrator and the arbitrator's decision makes *no* mention of statutorily protected rights, we find it difficult to conclude "that the arbitrator consider[ed] the statutory issue and rule[d] on it or all the facts required to decide it." *General Warehouse*, 643 F.2d at 969 & n.17. *But cf. Motor Convoy*, 673 F.2d at 736 (based on the evidence presented to the arbitration panel, inherent in its decision was a resolution of the question of whether employee was fired for protected union activities).

> [T]he prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Id. at 254 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)) (footnote omitted). The burden of establishing a *prima facie* case is not onerous. *Burdine*, 450 U.S. at 253.

31. We do not think that the ALJ erred in holding that the General Counsel establishted a *prima facie* case of unlawful discrimination. The General Counsel produced evidence that UPS knew that Bowlds and Perkins were involved in widespread protected activity, including organizing efforts for UPSurge. The General Counsel also presented evidence that Bowlds and Perkins, at the time of their discharges, were involved in another unfair labor practice proceeding concerning alleged discrimination for union activity. Bowlds and Perkins both testified that, contrary to reports by UPS's supervisors, they did not overextend their breaks on the night of August 27-28. Evidence corroborating their testimony was introduced by the General Counsel.[24] Those facts are sufficient to support an inference that UPS discharged

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[24] App. at 247a-49a, 275a, 278a, 472a-76a, 529a-31a, 631a.

Bowlds and Perkins for their protected activities. Accordingly, we hold that the General Counsel met his threshold burden of establishing a *prima facie* case of discriminatory discharge.

3. *The Burden of Proof Issue*

32. UPS's final contention is that, assuming establishment of a *prima facie* case, the ALJ improperly shifted to UPS the burden of proving that Bowlds and Perkins would have been discharged regardless of their protected activity. In *Behring International, Inc. v. NLRB*, we outlined the appropriate burdens of going forward and of proof to be applied in a discriminatory discharge case.

> Under our formula, once the General Counsel has established a *prima facie* case of discriminatory discharge, the employer should rebut this with evidence of a legitimate business reason for its action. The ultimate burden of proof does not shift from the General Counsel and does not devolve upon the employer at any stage. Therefore, no violation may be found unless the Board determines that the General Counsel has proved by a preponderance of the evidence that the employer's anti-union animus was the real cause of the discharge.

675 F.2d 83, 90 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3199 (U.S. Sept. 13, 1982) (No. 82-438); *see NLRB v. Blackstone*, 685 F.2d 102, 105 (3d Cir.), *cert. denied*, 103 S. Ct. —— (1982). UPS argues that the Board failed to apply that test when it determined that UPS had violated the Act by discharging Bowlds and Perkins. UPS contends that the Board instead applied its *Wright Line* test, which

shifts the burden of persuasion on the issue of motive to the employer once the General Counsel establishes a *prima facie* case of discriminatory discharge. *See Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 899 (1982).[26] Accordingly, UPS urges us to deny enforcement.

33. We agree that the ALJ and the Board misallocated the burden of persuasion in the instant case. In his decision the ALJ clearly shifted to UPS the burden of proving that the discharges would have taken place in the absence of any protected conduct. App. at 163a. The Board specifically affirmed the ALJ's rulings, findings, and conclusions. Because the ALJ's and the Board's decisions are in contravention of our

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[26] Note that in *Behring* we approved that part of the Board's *Wright Line* opinion which placed the initial burden on the General Counsel to establish a *prima facie* case of unlawful discrimination. We disagreed with the Board, however, that once a *prima facie* case is shown the burden of persuasion shifts to the employer. *Behring*, 675 F.2d at 90; *see Blackstone*, 685 F.2d at 105. We emphasized the importance of the procedural aspects of a discriminatory discharge case. We stated:

> From a practical standpoint, it is unlikely that the decision in many cases will turn on whether the employer's burden is characterized as being one of persuasion or production. Nevertheless, as the Board recognized in *Wright Line*, 251 N.L.R.B. at 1087, "[t]"his distinction is a crucial one since the decision as to who bears this burden can be determinative." We think that fewer errors will result if the distinction is properly observed.

Behring, 675 F.2d at 90 (footnote omitted).

The Supreme Court has recently granted certiorari in *NLRB v. Transp. Management Corp.*, 674 F.2d 130 (1st Cir.) (per curiam), *cert. granted*, 103 S. Ct. 372 (1982), to resolve the conflict between the Board and various courts of appeals on the burden of proof issue.

holding in *Behring*, we cannot enforce the Board's order and must remand to the Board for reconsideration. *Blackstone*, 685 F.2d at 106; *Behring*, 675 F.2d at 91.

IV

34. We will vacate the Board's order reinstating Bowlds and Perkins and awarding them backpay and other benefits, and we will remand the case for further proceedings. In all other respects we will enforce the Board's order.

ROSENN, *Circuit Judge*, Concurring and Dissenting.

I agree with the majority that because the Board improperly allocated the burden of proof in determining that the discharges of Bowlds and Perkins were discriminatory, the case must be remanded for further consideration of this charge. But I believe that the majority has erred in its separate holding that United Parcel Service (UPS) violated section 8(a)(1) of the Act by its overly broad rule against the distribution of union literature. The Company has raised an important statute of limitations challenge to the Board's finding of this unfair labor practice, and I think this challenge also warrants further consideration on remand.

The Board determined that UPS violated section 8(a)(1) of the Act entirely on the basis of the incident in which Supervisor Mouser told employee Perkins that "I'd rather you didn't" distribute literature on company property. The testimony indicated that this statement was made sometime in February or March 1979. Since the Administrative Law Judge had found a violation of section 8(a)(1) under a different theory, he made no finding as to precisely

when Mouser's statement was made. Yet the date of the statement became a crucial item of information under the Board's theory of the case. Section 10(b) of the Act precludes the Board from issuing a complaint unless formal charges were filed with the Board within six months of the alleged unfair labor practice. 29 U.S.C. § 160(b). Because Perkins filed his charge on September 12, 1979, the General Counsel could only issue a complaint concerning events taking place after March 12, 1979. Thus, section 10(b) would require the Board to ascertain precisely when the Mouser-Perkins conversation occurred before the conversation could serve as the basis of an unfair labor practice finding. The Board did not consider this problem in making its decision.

The majority disposes of this statute of limitations defense on the ground that it was not adequately raised before the Board, and that therefore this court may not consider it now. Under section 10(e) of the Act, 29 U.S.C. § 160(e), the court of appeals may not consider any argument that an employer failed to raise before the Board unless "extraordinary circumstances" exist. *See Woelke & Romero Framing, Inc. v. NLRB*, 50 U.S.L.W. 4538, 4543 (U.S. 1982). The Company argues that it adequately raised the issue before the Board because in its brief to the Board filed in support of its exceptions to the Regional Director's report, it clearly stated that "the section 10(b) limitations preclude any . . . finding" that Mouser's statement violated the Act. The majority does not consider this adequate to raise the defense because the argument was not made in the Company's formal exceptions but only in its supporting brief. *See* typescript op. at 18 n.16.

To my mind, this is an unduly technical and unreasonable disposition of this issue. The majority

refers to regulations of the Board requiring parties to include in their exceptions all matters that are to be argued before the Board, and limiting the brief to matters within the scope of the exceptions. *See* 29 C.F.R. § 102.46. It is undeniable, however, that the Board was informed of the statute of limitations issue.

We have previously held that a technical failure to comply with the Board's procedural rules governing objections will not bar an employer from making his argument to the court of appeals so long as the Board was "adequately appraised" of the employer's position. *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45, 48 (3d Cir. 1965). *See also NLRB v. Blake Construction Co.*, 663 F.2d 272, 283-84 (D.C. Cir. 1981) ("We do not think section 10(e) requires such a triumph of technical pleading over fundamental fairness."). Especially in the instant case, where the Board itself saw fit to reformulate the section 8(a)(1) issue at the last minute,[1] I am very reluctant to adopt the excessively technical approach to section 10(e) that the majority does. As we recently have observed, "The purpose of § 10(e) is to ensure against piecemeal appeals to the courts by requiring that the parties first give the Board an opportunity to rule upon all material issues in a case." *NLRB v. Cardox Division of Chemetron Corp.*, 699 F.2d 148, 153 n.10 (3d Cir. 1983). In the instant case, the Board had such an opportunity. I cannot conceive of any purpose that

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[1] The Administrative Law Judge found a continuing violation of section 8(a)(1) arising out of a posted work rule pertaining to distribution of literature in the plant, and apparently viewed Mouser's statement as simply one instance of the implementation of this work rule. The Board, however, relied solely on Mouser's statement to Perkins as the basis for the unfair labor practice finding.

would be served by foreclosing the Company from arguing its statute of limitations defense on the ground that, though it made the argument to the Board in very explicit terms, it did so on the wrong page.

I therefore think that the statute of limitations issue was adequately raised below and may be considered by the court on appeal.[2] The record suggests that this defense quite possibly has merit, since Mouser's statement may have been made in February or the first few days of March. Accordingly, upon remand of the case, the Board should also be directed to ascertain whether Mouser's statement took place within the statutory six-month period of section 10(b).[3] I therefore dissent on this statute of limitations issue.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[2] The Company maintains that, assuming it did not adequately meet the requirement of section 10(e) that the statute of limitations issue be specifically raised before the Board, it should be excused for not having done so, because it was only when the Board reformulated the position of the ALJ that the statute of limitations issue became crucial. This argument might have had some merit, were it not for the Supreme Court's recent decision in Woelke & Romero Framing, Inc. v. NLRB, 50 U.S.L.W. 4538, 4543 (1982), where the Court suggested that the section 10(e) bar applies even where an issue is injected into the proceedings by the Board's decision, since the opposing party still has the option of filing a motion for reconsideration with the Board. But, as noted above, I believe that the Company adequately urged its statute of limitations objection before the Board.

[3] Since the case is being remanded to the Board on the discriminatory discharge issue, no further delay or inconvenience to the parties would be caused by remanding on the 8(a)(1) issue as well.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-3318

UNITED PARCEL SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

JUDGMENT

Before: GIBBONS, HUNTER and ROSENN, *Circuit Judges*

THIS CAUSE came to be heard upon a petition filed by United Parcel Service, Inc., Owensboro, Kentucky, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on May 12, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 15, 1983, and has considered the briefs and transcript of record filed in this cause. On April 18, 1983, the Court being fully advised in the premises handed down its decision in which it granted enforcement of the Board's order in part, vacated in part and remanded the case to the Board for further proceedings. In conformity therewith, it is hereby

ORDER AND ADJUDGED by the Court that Petitioner, United Parcel Service, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and enforcing a no-distribution rule prohibiting distribution of union materials on Company property at any time.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its facility in Owensboro and Campbellsville, Kentucky copies of the attached notice marked "Appendix." Copies of said notices, on forms to be provided by the Regional Director for Region 25, of the National Labor Relations Board (Indianapolis, Indiana) after being duly signed by Petitioner's representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director in writing, within 20 days from the receipt of this judgment, what steps have been taken to comply herewith.

BY THE COURT

/s/ James Hunter III
Circuit Judge

DATED: May 17, 1983

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT promulgate, maintain, or enforce a no-distribution rule prohibiting distribution of union literature or materials on company property at any time.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them under the Act.

UNITED PARCEL SERVICE, INC.

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, room 232, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, Telephone 317—269—7413.

APPENDIX C

FJZ

D—8843
Owensboro, KY

261 NLRB No. 134

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 25—CA—11313

Case 25—CA—11313—2

UNITED PARCEL SERVICE, INC.

and

ROBERT W. BOWLDS, an Individual
DAVID E. PERKINS, an Individual

DECISION AND ORDER

On October 30, 1980, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of Administrative Law Judge's Decision, and Respondent filed a supplemental brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Respondent's unopposed motion to file a supplemental brief is granted.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

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[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In affirming the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by promulgating, maintaining, and enforcing an unlawfully broad no-distribution rule, we refer solely to the implied restrictions against distribution on nonworking time which Supervisor Mouser communicated to employee Perkins in a February or March 1979 conversation. We find no need to decide whether Respondent's written no-solicitation, no-distribution rules also violated Sec. 8(a)(1). See *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB No. 47 (1981).

[4] The Administrative Law Judge recommended that Respondent cease and desist from "in any like or related manner" interfering with the employees' Sec. 7 rights. We find that the issuance of a broad order is warranted inasmuch as Respondent has previously been found to have violated the Act in certain respects similar to the violations found herein. See *United Parcel Service, Inc.*, 252 NLRB 1015 (1980). Thus, Respondent has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for the employees' fundamental Sec. 7 rights.

We note that during this proceeding, and during the grievance and arbitration proceedings involving employee Bowlds' suspension on August 28, 1979, and his subsequent discharge,

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, United Parcel Service, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the disciplinary suspension of Bowlds and Perkins issued on August 28, 1979, and to their subsequent discharges, and notify them in writing that this has been done, and that evidence of these unlawful actions will

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Respondent defended its conduct by relying in part on a final warning letter it issued to Bowlds on October 3, 1978. In *United Parcel Service, Inc.*, 252 NLRB 1015 (1980), the Board found that the discipline which resulted in this final warning letter was unlawful. It follows that this letter was nullified by the Board's decision. Respondent's use of the letter, in the instant case, as evidence that its discipline of Bowlds was legitimate is, to the contrary, further proof of Respondent's unlawful discriminatory motivation.

Apparently through inadvertence the Administrative Law Judge failed to require Respondent to expunge from its records any references to the August 28, 1979, suspensions and subsequent discharges of Bowlds and Perkins. We shall modify the recommended Order accordingly.

not be used as a basis for future discipline against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. May 21, 1982

.....

JOHN H. FANNING,
Member

.....

HOWARD JENKINS, JR.,
Member

.....

DON A. ZIMMERMAN,
Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

> To engage in self-organization
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
>
> To refrain from the exercise of any or all such activities.

WE WILL NOT promulgate, maintain, or enforce a no-distribution rule prohibiting distribution of union literature or materials on company property at any time.

WE WILL NOT discriminate against our employees because they gave testimony in a Board proceeding.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees in violation of the rights guaranteed them under the Act.

WE WILL NOT discourage membership in Teamsters Local 710 or Teamsters Local 89, or any other labor organization, by discriminating against our employees in regard to their hire and tenure of employment or any terms or conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them under the Act.

WE WILL offer to Robert Bowlds and David Perkins reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or benefits, plus interest.

WE WILL expunge from our files any references to the disciplinary suspensions of Bowlds and Perkins issued on August 28, 1979, and to their subsequent discharges, and notify them in writing that this has been done, and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

UNITED PARCEL SERVICE, INC.

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 232, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, Telephone 317—269—7413.

JD-635-80
Owensboro, KY

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 25-CA-11,313

Case 25-CA-11,313-2

UNITED PARCEL SERVICE, INC.

and

ROBERT W. BOWLDS, An Individual

and

DAVID E. PERKINS, An Individual

DECISION

Statement of the Case

PHIL W. SAUNDERS, Administrative Judge: Based on charges and amended charges filed on certain dates in September and October, 1979, by Robert Bowlds and David Perkins, a consolidated complaint was issued on October 24, 1979, against United Parcel Service, Inc., herein the Respondent or the Company, alleging violations of Section 8(a)(1), (3) and (4) of the Act. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and the Respondent filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

The Respondent is an Ohio corporation with an office and place of business located at Owensboro, Kentucky, and where it is engaged in the interstate transportation and distribution of parcels and a parcel delivery service. During the year preceding the hearing herein, Respondent performed services valued in excess of $50,000 in States other than the State of Kentucky. During the same period it received gross revenues in excess of $500,000, as a link in the interstate transportation of goods. It is conceded, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Teamsters Local 710, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters Local 89, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

It is alleged that in March 1979 the Respondent promulgated and since said date has maintained the following rule:

No distribution of UPSurge written material on the Respondent's property at any time.

That the Respondent promulgated the rule described above in order to discourage its employees from joining, supporting or assisting UPSurge, and that in March 1979 the Respondent, by its officer and agent Tom Mouser, maintained and enforced the rule by prohibiting its employees from passing out UPSurge materials at any time while they were on Company property.

It is further alleged that on August 31, 1979, the Respondent discharged Robert Bowlds and David Perkins, and that the Respondent did so because:

(i) said employees filed charges with the Board and gave testimony under the Act;

(ii) said employees joined and assisted Teamsters Local 710 and Teamsters Local 89;

(iii) said employees joined and assisted UPSurge;

(iv) said employees joined and assisted PROD;

(v) said employees engaged in other union activity and concerted activities for the purpose of collective bargaining and mutual aid and protection, including participation in filing a civil suit against Respondent, and because the Respondent believed they had engaged in such activities or would do so.

Since 1965, Bob Bowlds has been employed by Respondent at its Owensboro, Kentucky, facility as a feeder driver. During 1979 his scheduled run was from Owensboro to Nashville and then a return trip.

During the periods material hereto, David Perkins started his feeder run at Campbellsville, Kentucky, his home base, drove to Nashville, and on his way back made a stop at Bowling Green, Kentucky, and then returned to Campbellsville. Perkins had driven this run since 1977. The Company maintains that both drivers were terminated in late August 1979 for over-extending their rest breaks and falsifying their time-cards.

It appears that feeder drivers, such as Bowlds and Perkins, report each day to their home location, drive a trailer load of packages to the same destination or terminal for dropoffs, and then return to their origin that same workday with a new load of packages. A feeder driver is assigned a specific start time each day to begin his scheduled run. After punching the timeclock, a feeder driver must "pre-trip" his truck before departure from the terminal. This consists of checking oil and water and visually inspecting the safety equipment on the tractor and trailer. After completion of the "pre-trip inspection" the feeder driver then updates his ICC logbook and timecard. Each driver is assigned a specific time when he is scheduled to physically depart his home facility and begin driving to his destination.

When en route to his destination, the feeder driver is allowed one 15-minute break on the down leg, provided the distance to his destination is 100 miles or greater. In addition to the 15-minute break, the driver is also allowed up to 5 minutes additional time contiguous with the rest break for visual safety inspection of his rig and to update his timecard and logbook, but the time and place of the 15-minute rest break is left to the discretion of the driver. However, each feeder driver is scheduled to arrive at his desti-

nation at a precise time. The Company maintains that punctuality is paramount due to the fact that each package load is destined for different States, and the packages must be re-sorted at the destination and then loaded on to other feeders or trucks which are scheduled to leave at precise times in order to make connections at their destinations.

It also appears that once at his destination (Nashville) the feeder driver then takes his 30-minute lunch break. Other duties of the feeder driver at his destination terminal include fueling of tractors, washing trailers, spotting trailers in the hub yard, and loading or unloading packages, and each driver, when his return trailer is hooked up, must complete another "pretrip" inspection prior to departure and update his logbook. Departure for return to his home terminal is also scheduled on an assigned time, and on his return, if it exceeds 100 miles, the feeder driver is again allowed another 15-minute rest break, plus the 5-minute safety check including the update of his logbook and timecard. The driver is also assigned a specific time to return to his home terminal, and upon arrival makes a visual "post-trip" inspection of his equipment, completes his logbook and timecard, and punches out. The timecard, which is filled out completely by the driver, must accurately reflect the amount of time the feeder driver spent on the road and on breaks, and in conformity with government regulations and Company policy, each feeder driver must also note any defects or problems with his equipment on a Car Condition Report.

As to Bowlds

For background purposes, it is noted that Bowlds was terminated twice in 1978. He was first dis-

charged by Respondent on April 24, 1978. Thereafter, on May 24, 1978, Bowlds received a final warning. This warning, also pursuant to the grievance procedure, was rescinded on June 14, 1978. Bowlds was again terminated on August 4, 1978, but again pursuant to the proceedings and a decision at the final arbitration step of the grievance procedure, Bowlds was reinstated on or about October 3, 1978. However, in the absence of an award for backpay by the arbitration panel, Bowlds was not reimbursed for the aforestated period that he was off work.[1] There was also an earlier case before the Board (United Parcel Service, Inc., 25-CA-10318), involving the August 4, 1978, termination of Bowlds alleging that Respondent unlawfully discharged Bowlds for his union activities —for his efforts on behalf of PROD and UPSurge, and for his participation in the filing of a lawsuit in the United States District Court for the Western District of Kentucky to improve working conditions at Respondent. This earlier Board case was tried on April 5, May 30, and September 12, 1979, and Administrative Judge John P. von Rohr issued his Decision on January 10, 1980. In this earlier case the issue was similar to the instant one: did Respondent fire Bowlds for overstaying his 15-minute break? (Perkins was not involved in this case.) Judge von Rohr found and concluded that Bowlds was unlawfully issued a final warning earlier and then later unlawfully discharged for his union and protected concerted activities. Judge von Rohr noted, among other

[1] It appears that at all times material hereto Respondent's employees were represented by Local No. 89 of the Teamsters Union, and that all grievance matters, meetings and awards, as detailed herein, were held under the grievance procedure of the collective-bargaining agreement between the parties.

circumstances, that Bowlds was discharged unlawfully for his activities on behalf of PROD and UPSurge, as well as Bowlds' participation in the class action suit against Respondent in the U.S. District Court, and the Board recently affirmed this Decision. See *United Parcel Service, Inc.*, 252 NLRB No. 145.

It is noted that UPSurge is an organization of Respondent employees which is generally critical of the Teamsters Union, as well as the Respondent, in matters pertaining to labor relations and in matters pertaining to the employees' wages, hours and working conditions. This organization periodically publishes a newspaper and other pamphlets to express its views. "PROD" is a related organization of Respondent employees, similarly involved. I need not dwell further on the subject, since the Board has held, and I find, that employee activities on behalf of these organizations constitute concerted protected activity.[2] As relevant background to the instant case, I further take official notice that the Board, in the aforecited cases, has found that Respondent has engaged in various unfair labor practices in connection with its opposition to employee activities on behalf of the organizations in question.

UPSurge activities among Respondent's employees began in 1975. From then on, and at all times material hereto, Bowlds was responsible for distributing UPSurge's newsletter and literature among the 45-50 employees at the Owensboro Terminal in late 1976 or early 1977. Bowlds engaged in similar activities on behalf of PROD at that facility and distributed the

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[2] *United Parcel Service, Inc.*, 230 NLRB 1147; *United Parcel Service, Inc.*, 234 NLRB 223 (1978); *United Parcel Service, Inc.*, 234 NLRB 483 (1978); enforcement denied, No. 78-1258. (C.A. 6) October 12, 1979 (citation n/a).

bi-monthly PROD newsletter to the Owensboro employees. Bowlds specifically testified that when he openly distributed UPSurge at the Owensboro Terminal—Supervisor Tom Campbell was present on several occasions while he did so—in 1977, 1978 and 1979. Bowlds further testified that when he openly distributed PROD at the Owensboro Terminal, he did so in front of Supervisors Tom Campbell, Herschel Cash, and Mike Worth.

As to the 1977 class action suit against Respondent in the U.S. District Court—Bowlds stated that he assisted in bringing this suit on behalf of drivers in Kentucky relative to a State statute prescribing or pertaining to certain breaktimes, and that he also solicited money for this suit and later hand-passed and mailed out petitions in conjunction therewith. He stated that the case is now (April 1980) being reviewed by the Sixth Circuit Court of Appeals.

The Respondent produced testimony through their Division Manager Bob Jones, who has overall responsibility for all feeder operations in Kentucky, to the effect that from the time Bowlds was reinstated on October 3, 1978, as aforestated, until August 27, 1979, he had received occasional complaints about Bowlds returning late to the Owensboro Center—that both Owensboro Center Management Tom Campbell and Western Division Manager Ben Cissell had reported that Bowlds was still returning behind schedule. Jones then relayed these complaints to Darwin Turpin, the feeder manager, and later on to Turpin's successor, George Knoblock.

The Respondent also has a policy of running "service checks" on its drivers from time to time, and on March 14, 1979, Feeder Supervisor Herschel Cash went with Bowlds and performed a service check of

Bowlds from the Owensboro Center to his destination at Nashville and back. It appears that the general purpose of the service check is for a supervisory inspection and evaluation of driver performance, and which is undertaken every few months for all feeder drivers. On this occasion Bowlds arrived at Nashville about 4 minutes late. He then departed Nashville on time and arrived at the Owensboro Center about 8 minutes late. At the conclusion of the run Supervisor Cash told Bowlds how he could correct this delay. Bowlds had taken the proper rest breaks on this run. On May 9, 1979, Supervisor Cash again made a service check on Bowlds, and again Bowlds complied with the rest break periods, but was 6 or 7 minutes late in arriving in both directions.[3]

Supervisor Cash receives weekly operation reports which reflect the actual driving time, turn-around time, and finish time of all feeder drivers under his supervision, and Cash testified that between August 1 and August 27, 1979, Bowlds was consistently returning to the Owensboro Center 15 minutes or more late. He stated that Bowlds was scheduled to arrive at Owensboro from Nashville at 6 a.m., yet he was returning at 6:15 a.m. or later. Moreover, that on August 22, 1979, he talked to Bowlds in Nashville, and again instructed him to have his trailer coupled, complete his pre-trip inspection, and be ready to leave

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[3] It appears that the Respondent also has a policy wherein feeder drivers are followed and monitored by supervisors from time to time in order to ascertain whether excessive breaks are taken, and that there have been instances in the past where such violations have been detected and the driver involved was then terminated or suspended where such a violation was proven, but it appears that in *most* instances in the past, the alleged offense was not proven.

the Nashville hub at 2:40 a.m., and to be "out the gate at 2:45 a.m." Bowlds replied, "Okay." Cash testified that a feeder driver does have control over the time he leaves the Nashville terminal, but Bowlds (and Perkins) testified that there can be several factors which can and do cause considerable delays from time to time.

Turning now to the specific events and circumstances involved in the instant case pertaining to Bowlds. On the night of August 27-28, 1979, Bowlds came to work early, at about 8:10 p.m. and with an assigned starting time to Nashville of 8:40 p.m. Bowlds was due to leave the Owensboro Terminal at 8:58 p.m., but testified he had come in prior to his starting time in order to get away early since he was sleepy, and also he had been asked by his fellow-driver Don McMahon to leave early so that McMahon could check out his CB radio en route. At 8:45 p.m. Bowlds started his trip and proceeded down the road on Kentucky's Green River Parkway, but testified that near the end of the Parkway he was having trouble staying awake, so around 10:15 p.m., he pulled over and stopped for less than 10 minutes in order to rest and relieve himself and to walk around and become more alert.[4]

Bowlds testified that his next stop was at the Key Truck Stop near Franklin, Kentucky, at about 11 p.m., and at this time he took his allowed 15-minute break—his timecard shows 11:02 p.m. to 11:17 p.m. It appears that on this occasion Bowlds had a cup of coffee with the night manager of the Key Truck Stop.

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[4] It appears that when drivers normally stopped for a few minutes to relieve themselves, such stops were not considered a "break," and therefore were not logged or noted.

Night Manager Wilson "Wimpy" Randolph testified that Bowlds came into the truck stop cafe almost nightly, and would take from 10 to 15 minutes to have coffee, and the only time that Bowlds took longer than 15 minutes was when his tractor broke down. (Respondent accused Bowlds of taking 22 minutes at this stop.) Bowlds then went on his way to Nashville and stated that he arrived at Nashville at about 12:17 a.m.—now August 28—and that he was only 1 minute late.

Bowlds testified that he left Nashville on his return leg at about 2:55 a.m., and arrived at Owensboro, Kentucky, at 6:16 a.m. on August 28, 1979, and en route stopped for his 15-minute break at the Amoco Service Station in Franklin, Kentucky, at about 4 a.m. along with over-the-road driver David Perkins. Tracy Sampson, night manager of the Amoco station, also had coffee with Bowlds and Perkins. Tracy Sampson stated that both Bowlds and Perkins were there that night at the Amoco station for only 15 minutes or so, and that Bowlds looked at his watch from time to time. According to Sampson, Bowlds and Perkins came in together and left together, and testified that he has never known Bowlds or Perkins to stay over 10 or 15 minutes, but could not remember the exact time on the morning here in question. (Respondent has accused Bowlds and Perkins of taking 32 minutes here.) Bowlds maintains he was back in his truck in 15 minutes and that he left the Amoco station at 4:15 a.m.

Bowlds testified that he then proceeded toward Owensboro, but "somewhere up the road" he began to get a little drowsy so he pulled off and relieved himself, and that this stop would not have been more than 5 minutes. According to Bowlds, he reached Owensboro 3 hours and 20 minutes after he left

Nashville, and which was the time allotted to him for this run. Bowlds explained that he was supposed to leave Nashville at 2:45 a.m., but on occasions there would be trucks ahead of him and so the exact departure time would vary a few minutes. On the date in question, according to Bowlds, on his return leg he arrived at Owensboro at 6:16 a.m. after leaving Nashville at 2:55 a.m.—3 hours and 21 minutes later, or 1 minute late. See Respondent Exhibit No. 6—Bowlds' timecard for the periods here in question.

On August 28, 1979, Bowlds was suspended by Supervisor Ben Cissell for allegedly overextending his breaks on August 27-28, 1979, and for falsifying his timecard. At the meeting with management on August 28—Bowlds asked when all this had taken place and who saw him overextend his breaktime. Union Steward Jim Weafer attended this meeting with Bowlds, and Bowlds testified that he also asked to see his personnel file in order to get information on the accusations, but was merely informed that it would be made available at a later date.

On August 30, 1979, Bowlds returned to Respondent's office to see his personnel file, but management did not have it, and Bowlds then filed a grievance contesting his August 28 suspension.

On August 31, 1979, Bowlds was called in and met with Union Steward Jim Weafer, and Supervisors Tom Campbell and Ben Cissell. Cissell told Bowlds that he was discharged for falsifying his timecard and overextending a break. Supervisor Cissell also asked Bowlds why he stopped along the Green River Parkway for 24 minutes on the southbound trip on the night of August 27. Bowlds replied he took less than 10 minutes since he was sleepy and had to relieve himself. Bowlds testified that on this occasion Cissell also accused him of stopping for 5 minutes

at the Amoco Truck Stop at Franklin, Kentucky, on his down leg, but he denied that he had stopped there. Then Cissell asked him why he took 22 minutes at the Key Truck Stop. Bowlds replied that he took *only* 15 minutes on his allotted break. Then Cissell, according to Bowlds, asked him why he took a 32-minute break at the Amoco Truck Stop on his northbound or return leg. Bowlds replied that he *only* took 15 minutes as his break at Amoco. Bowlds stated that he then inquired who in management saw him overextending his breaks, and Cissell answered Herschel Cash, and that he then again asked to see his personnel file, but Cissell replied that it was still in Louisville. Bowlds testified that during this meeting the fact that he (Bowlds) was the union steward at Owensboro Terminal and had filed many grievances, that he had been involved in the distribution of PROD and UPSurge literature at the Respondent's premises in sight of management in the past, that he had been a witness in his own Board case on May 30, 1979 (25-CA-10318) dealing with earlier events in that case, and that his involvement in a lawsuit against Respondent in the United States District Court to get better working conditions—were not brought up.

On September 4, 1979, Respondent mailed Bowlds a written copy of his discharge, and on September 4, 1979, Bowlds filed his grievance for his discharge of August 31.

On September 11, 1979, a local joint meeting concerning the grievance filed by Bowlds was held at Owensboro with Supervisors Ben Cissell, Tom Campbell, and Bob Jones representing the Respondent, and Thomas Trenaman of Local 89, Union Steward Jim Weafer, and Robert Bowlds, all representing the latter. According to Bowlds, Bob Jones read the

charge against him concerning overextending his breaks and falsifying his timecard for August 27-28, and also the earlier October 3, 1978, letter to Bowlds from Respondent (Respondent Exhibit No. 5) which provided an immediate discharge of Bowlds for another overextension of his breaktime. Union Agent Thomas Trenaman read the second Bowlds discharge grievance and it was agreed that the suspension grievance and the discharge grievance of Bowlds be treated as one. It appears that Trenaman also questioned management as to the times of the alleged overextension of Bowlds' breaktimes, and introduced the written notarized statement of Tracy Sampson, night manager of the Amoco Truck Stop, dealing with the early morning of August 28, and the notarized statement of Don McMahon concerning the fact that Bowlds had come to work early the night of August 27, and had departed from the Owensboro Terminal early, and that this was not an uncommon practice for drivers to do. Respondent did not produce the clock times of Bowlds' alleged overextension of his breaks of August 27-28, and also mentioned that Respondent's observers of Bowlds' alleged overextensions—were Supervisors Herschel Cash along with George Knoblock and Larry Harris. At this September 11th joint grievance meeting, Bowlds also told his story concerning the events and circumstances on the night of August 27 and the morning of August 28, as aforestated, but testified that his involvement with PROD and UPSurge on Respondent's premises in management's presence, his participating in the class action lawsuit against Respondent in the U.S. District Court to secure better working conditions for Respondent's Kentucky employees, his being the Union job steward at the Owensboro Terminal of Respond-

ent, his filing of many grievances in recent years, and his testifying in his own behalf in the earlier Board case, were not discussed (except partially read as a grievance) in this joint meeting. The parties were DEADLOCKED at this September 11th joint grievance meeting and the case was referred to the next step in the grievance procedure — the State Panel.

At the Kentucky State level joint grievance meeting concerning Bowlds' grievance, held at Louisville on October 9, 1979—management representative Bob Jones read the charges against Bowlds for his alleged overextension of his breaks and falsifying his timecard on August 27 and 28, 1979. Jones also read the Respondent's October 3, 1978, "final warning" letter to Bowlds and discussed the times on August 27-28 that Bowlds allegedly overextended his breaks, and management then called Respondent's Supervisors Herschel Cash, Larry Harris, and George Knoblock to testify against Bowlds concerning their observations on the night and morning here in question. Bowlds also repeated his story, but again stated that the class action in the U.S. District Court of Louisville, his PROD and UPSurge handbill distribution on Respondent's premises in management's presence, his job stewardship and his filing of grievances against Respondent, his filing of his charge in his earlier case and his giving testimony in support of it, were not discussed except that Trenaman, in stating Bowld's grievance, did make some reference thereto by reading the grievance. This October 8, 1979, State Level Panel was also deadlocked.

On October 30, 1979, the Joint Area Conference meeting concerning Bowlds' grievance was held in the Sheraton Inn at O'Hare Airport in Chicago. Jones

again read the charge against Bowlds, furnished statements from managements' three witnesses—Herschel Cash, Larry Harris, and George Knoblock—read the "final warning" letter of October 3, 1978, and read the times of the alleged overextension of the breaks. Bowlds then spoke concerning these events and circumstances in the same way as he had done before, but again the above-mentioned union and concerted activities of Bowlds were not discussed. This JAC joint meeting was also deadlocked.

On November 20, 1979, "a Deadlocked JAC" joint meeting took place in Chicago, and a summary of the two parties' positions was presented before the judging panel. Bowlds spoke briefly and either transcripts of the JAC meeting or affidavits were introduced, but again his union and concerted activities were not specifically discussed. Bowlds lost at this level since the panel denied his grievances, and sustained Respondent's discharge of Bowlds. It appears that at each step of the grievance procedure, Trenaman read Bowlds' grievance in its entirety into the record, and at each level Bowlds was afforded the opportunity to submit additional evidence in support of his grievance.

As to Perkins

For the periods involved herein, Perkins started his feeder run at Campbellsville (his home base), drove to Nashville, and on his return trip made a stop at Bowling Green, and then back to Campbellsville.[5] He started his employment with Respondent in 1971.

Under normal circumstances Perkins came to work at 9:55 p.m. (punch in time), and was due to go out

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[5] Perkins operated on Eastern Standard Time—1 hour ahead of Owensboro and Nashville.

of the Campbellsville Terminal at 10:10 p.m. (EST). Perkins testified that the Nashville supervisor told him that he was to be at Nashville at 1:40 a.m., but that his Campbellsville supervisor told him he was to be at Nashville at 1:34 a.m. Perkins was also told to leave Nashville at 3:45 a.m. but no later than 4 a.m. and was scheduled to return at 8:05 a.m. to Campbellsville, but in early 1979 this time was changed to 7:55 a.m. However, there was no mileage change—only 10 minutes taken off the driving time, and Perkins stated that at the time of this change, he explained to the supervisor that he could not make the run in 10 minutes less, but the supervisor told Perkins that this 10-minute cut was based on a national average, and then told him to do the best he could. Thereafter, Perkins would sometimes run late by about 10 minutes in getting into his home base, and in the spring of 1979 his supervisor at Campbellsville, Tom Mouser, began telling Perkins that he was getting to the home terminal late. Perkins testified that he sometimes left Nashville late and other times got tied up at Bowling Green to sort packages. Perkins stated that for a while he also noticed the Campbellsville Terminal's clock was 10 minutes fast and that he reported this to management on a number of occasions, but it was not corrected.

On the night of August 27, 1979, Perkins left Campbellsville at 10:25 p.m. (15 minutes late) and arrived at Nashville at 1.55 a.m. (EST). According to Perkins, he left Nashville at 3:55 a.m., arriving back at Campbellsville at 8:05 a.m., with a 15-minute break at 12:15 a.m. to 12:30 a.m. on the down leg (southbound), and a 15-minute break with Robert

Bowlds at 5:05 a.m. to 5:20 a.m. (EST) at Franklin, Kentucky—at the Amoco Truck Stop on his return.[6] Perkins notes that he actually stopped at the Amoco Truck Stop at 4:58 a.m. (EST) and it was 5 a.m. (EST) by the time he and Bowlds (who had been driving caravan with Perkins from Nashville) went into the Amoco Truck Stop lot. Perkins then updated his logbook and next went into the Amoco Truck Stop cafe and joined Bowlds and Amoco Manager Tracy Sampson in a booth. Perkins stated at this time that they could not sit there long because he and Bowlds only had 15 minutes to stay there, and he checked his watch as did Bowlds. Both drivers then left, and Perkins continued on to Campbellsville, but before reaching his destination had to stop 3 or 4 minutes to let his hot engine cool off.

That evening (August 28) Perkins talked with management people at Campbellsville. Bob Jones, Neil Mulvaney, and George Knoblock, all supervisors of Respondent, spoke with Perkins, and in the presence of Steward Bobby McMahon. Jones told Perkins that he had been observed overextending his break and falsifying his timecard, and that he was suspended until further investigation. Perkins then asked, where and when? Jones replied that their lawyers had this information.

Two days later, on August 30, Perkins was then called in by Supervisor George Knoblock, and again Jones, Knoblock, and Mulvaney were present, and Perkins then called in McMahon, the union steward. Supervisor Jones accused Perkins of taking 32 minutes at the Amoco Truck Stop on the morning of August 28, and that he was terminated. Perkins testified that both he and McMahon asked for the clock

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[6] See General Counsel Exhibit No. 11—the timecard of Perkins for the period herein in dispute.

times of this break, but Jones told them that their lawyers had it, and that Union Agent Tom Trenaman would later get this information.

Perkins stated that he had testified in the earlier case involving Bowlds, and that on occasions he had also distributed UPSurge handbills at the Campbellsville terminal in the presence of Terminal Manager Tom Mouser (in February or March 1979), and that Mouser had told him that he preferred that he (Perkins) not do it. Perkins said that he also distributed PROD at the terminal at Campbellsville on one occasion. Moreover, Perkins testified that he also was active in the U.S. District Court class action lawsuit with Bowlds by collecting money from employees beginning about October 11, 1976, and thereafter, at the Campbellsville Terminal, and that he further collected signatures for this class action from Campbellsville drivers and then turned in the signed petitions to Bowlds. Additionally, Perkins filed grievances including one on February 14, 1979, against Respondent, and it went through the grievance procedure under the Teamsters' contract with Respondent but Perkins lost this grievance.[7] Perkins testified that on

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[7] Counsel for Respondent argues that the allegations that Bowlds' and Perkins' suspensions and discharges resulted from discrimination based on supposed activities for PROD, UPSurge, the rest break lawsuit, the grievance filings, and their participation and testimony in the earlier Board case, are all transparent. Respondent points to Jim Weafer, a union steward for many years, and the fact that Weafer has filed a number of grievances and has testified in different matters and yet was never disciplined, and Weafer was also one of the 13 named plaintiffs in the rest break class lawsuit. It is also pointed out that Supervisor Mouser denied seeing Perkins distribute UPSurge, and that Bowlds could not recall any specific day or month he distributed UPSurge or PROD at the terminal in Owensboro.

February 28, 1979, he told Supervisor Mouser that he needed some additional trousers or pants for his uniform, but Mouser answered, "Perkins, we're trying to figure out a way to fire your ass anyway. We won't have to get you any." Perkins said that employees Bobby Pierce and Eddy O'Banion were in the immediate area of Mouser at the time. It is noted that both Pierce and O'Banion were in corroboration of Perkins as to this incident.

Campbellsville Center Manager Tom Mouser has been stationed there since February 1978, but Mouser was absent from the Center from July through October, 1979, on special assignment, so he had nothing directly to do with Perkins' suspension and discharge in late August 1979. However, this record shows that all Company drivers are furnished uniforms and are required to wear them whenever they are on duty—and such requirements are contained in the bargaining contract. Mouser testified that sometime in early 1978, it was reported to him that Perkins had driven that night wearing blue jeans and not his uniform trousers, and as a result he told Perkins that if he ever needed uniform trousers to let him know, and that later in 1978, he took Perkins' uniform to the cleaners on several occasions—that in February 1979, Perkins reported, after he returned from his run, that he needed a clean pair of pants for that night. Mouser said that he would get them for him, but Perkins replied, "If you don't have them ready, I'll wear my bluejeans out of the Center." Mouser testified that he then told Perkins that he would have a pair of pants there for him and he was not to leave the Center wearing blue jeans, and added that if Perkins did so he would be terminated. At the time this conversation occurred, Mouser admittedly was

working the package sort near Bob Pierce and Ed O'Banion.

After Perkins was discharged, he filed a grievance on September 4, 1979, and the grievance was processed. On September 11, 1979, a joint local hearing was held at Owensboro and Perkins' grievance was heard at the local level on the same day that Perkins testified at the Board's hearing in the prior Board case (25-CA-10318). At this grievance hearing Supervisor Bob Jones accused Perkins of taking 32 minutes break on the morning of August 28 at the Amoco Truck Stop, and falsely putting down the wrong time on his timecard. Then Union Agent Tom Trenaman read Perkins' grievance, and introduced the affidavit of Amoco Manager Tracy Sampson [8] (mentioned above in Bowlds' case), stating that Bowlds and Perkins were there only about 15 minutes. Further, Trenaman presented Jones with the affidavit from Pierce [9] stating that Mouser had informed Perkins in February that Mouser was going to fire Perkins anyway, as aforestated. At this meeting no one discussed Perkins' involvement with PROD, with UPSurge, his involvement with the class action lawsuit against Respondent, the filing of his February, 1979, grievance, or Perkins' former testimony in the earlier Bowlds' case (25-CA-10318).

On October 9, 1979, Perkins attended a State level joint grievance meeting at Louisville, and again Supervisor Bob Jones presented the Respondent's case reading the charge that Perkins took a 32-minute break on August 28, from 3:53 a.m. to 4:25 a.m.— Union Agent Tom Trenaman presented Perkins' case,

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[8] See Respondent Exhibit No. 2.

[9] See Respondent Exhibit No. 1.

and offered the above mentioned affidavits from Sampson and Pierce. Then Respondent's three witnesses testified at this meeting (Harris, Cash and Knoblock). As pointed out, the only new thing that Jones brought up at this meeting in addition to the 32-minute break, was that Perkins was consistently late coming in to Campbellsville. However, the panel decided that Perkins should go back to his job on the next day, but without backpay, and Perkins did so on October 10, 1979.

Respondent's case as to Bowlds and Perkins

The Respondent presented testimony through their witnesses to the effect that shortly after George Knoblock became feeder manager in May 1979, he received several calls from Campbellsville Center Manager Tom Mouser about Perkins' late return to Campbellsville and complaints that this was delaying his operation. Knoblock told Mouser he would send Supervisor Wayne Pruitt to investigate, and on May 14, 1979, Pruitt service checked Perkins, and on the following morning Pruitt called Knoblock and reported that Perkins had driven satisfactorily, but several days days later Knoblock talked to Mouser and told him that if Perkins started returning to Campbellsville late again, he would send Pruitt back.

Manager Knoblock testified that on August 22, 1979, he was service checking feeder driver Al Hester on his run to Nashville, and while at the Nashville hub he checked on his other Kentucky drivers who hook up in a line on one side of the Nashville terminal, but he could not locate Perkins. Knoblock then checked with the dispatcher and learned that Perkins had logged in, and that later he then saw Perkins coming around the building in his tractor to

back up to his trailer at 3:40 a.m. Knoblock stated that when Perkins stepped down he had sleep marks on his face and his eyes were swollen, and by this time Perkins had only 5 minutes left to safety check his vehicle and pull out. Knoblock then instructed Perkins, who had complained that his late arrivals at Campbellsville had been caused by delays at Nashville, to safety check his vehicle and pull out of Nashville by 3:45 a.m.

Turning now to the events and circumstances of August 27 and 28, 1979, as testified to by witnesses for the Respondent. Manager Knoblock stated that on the morning of August 27, he telephoned Division Manager Bob Jones to explain the problem he was having with Perkins—that Perkins was continually returning to the Campbellsville Center late, but whenever he rode with a supervisor, he performed satisfactorily. Knoblock then suggested to Jones that he would follow Perkins on his run and watch him and time his movements. Jones suggested that Knoblock get Loss Prevention Supervisor Larry Harris or someone in loss prevention to accompany him during his observance. Later that same morning, Supervisors Cash and Knoblock were in contact with one another and Knoblock told Cash he was going to follow Perkins that night. According to Knoblock, Cash then remarked that this would also be a good night for him to follow feeder driver Bob Bowlds, who had been returning late to Owensboro, and Cash said he would get Supervisor Hugh Gray to accompany him, but when Cash called back he said Gray was not available. Knoblock then told Cash to meet him at Franklin, Kentucky, that night and they would get in one car for the Nashville trip. Knoblock also contacted Larry Harris and that evening they met at the Company's

Louisville Center and left together in Knoblock's car for Cave City, Kentucky. They arrived at 9 p.m., Central time, and waited until 10:10 p.m., but never saw Perkins. When they decided they had missed Perkins, they then went directly to an AMOCO station at Exit 6, but again they did not locate Perkins so they drove to the Key Truck Stop at Franklin. Herschel Cash testified that he arrived in Owensboro on August 27 about 8 p.m., and drove to the intersection of U.S. Highway 60 East & 60 Bypass about ½ mile from the Owensboro Terminal, and at 8:45 p.m., he saw Bowlds drive past this intersection, and that he then pulled out behind Bowlds and followed him. Cash said that Bowlds took the Green River Parkway south and stopped about 100 yards beyond the Bowling Green toll booth at 9:56 p.m., and from the top of the exit ramp he then observed Bowlds outside his tractor—and that it was 10:20 p.m. before he pulled away—24 minutes later. Cash stated that he then followed Bowlds on Interstate 65 south, and about 20-22 miles down I-65, at Exit 6, Bowlds pulled into an Amoco Truck Stop at 10:41 p.m., stated that he waited on I-65 a few minutes and then pulled toward the Amoco Truck Stop and met Bowlds leaving the truck stop at 10:46 p.m.—that he then turned around and followed Bowlds to the Key Truck Stop at Exit 2. Cash said he drove past Bowlds' unit—which was then parked in front of the Key Truck Stop—at 10:54 p.m. and stayed until 11:16 p.m.—22 minutes.

It appears that when Knoblock and Harris approached the Key Truck Stop, they observed a Company tractor trailer parked in front of the restaurant with Bowlds in the cab, and that this was at 10:55 p.m. At 11 p.m., when they parked their car, they

then observed that the cab of the truck was empty and a few minutes later Knoblock saw Cash in the parking lot and he then went over to Cash's car and told him to join them in Knoblock's car. He stated that the three of them continued to observe the truck until 11:16 p.m., when Bowlds drove by in front of them. The three of them then followed Bowlds into Nashville where he arrived at 12:16 a.m., on August 28, and shortly thereafter Perkins pulled into the Nashville hub. Knoblock said that he then telephoned Jones to tell him what had transpired and that they had not seen Perkins on the down leg.

Witnesses for the Respondent testified that at 2:50 a.m., Central time, on August 28, Perkins left the Nashville terminal followed by Bowlds at 2:51 a.m., and that they (the three supervisors) followed Bowlds and Perkins ½ mile back on I-65 until about 5 miles south of the Kentucky State line, when they lost track of them, but when Knoblock, Harris and Cash reached the Key Truck Stop and still did not see Bowlds or Perkins—Cash got into his car and then both cars proceeded to the Amoco Truck Stop at Exit 6. It appears that at this point Cash went back to the Key Truck Stop and Knoblock and Harris went south to the rest area near the State line, and at this time Knoblock and Harris saw Bowlds and Perkins headed north on the other side of the road. Knoblock said that he turned around and followed them to the Amoco Truck Stop, and that when they arrived at the Amoco Truck Stop at 3:45 a.m. they observed Bowlds and Perkins in the cafe and testified that they remained there until 4:26 a.m.—32 minutes.

Cash said that he had observed Bowlds' and Perkins' units about 2 miles north of the Key Truck Stop, and stated that he then turned around and

pulled in the Amoco Truck Stop at 3:53 a.m. where he observed both Bowlds' and Perkins' units parked and empty in the back of the lot, and at 4:24 a.m. he observed Bowlds and Perkins emerge from the restaurant and at 4:25 a.m., both Bowlds and Perkins pulled away.

After Bowlds and Perkins pulled away, Knoblock, Harris and Cash agreed to follow Bowlds back to Owensboro, but Cash suggested that when they reached the Western Kentucky Parkway, he would call Owensboro Center Manager Tom Campbell, and ask him to note the time Bowlds pulled on the lot, to secure his timecard when he was ready to punch out, and then tell Bowlds they wanted to talk to him. Knoblock testified that when he and Harris continued to follow Bowlds, they had observed that at 5:31 a.m., about ¼ mile north of the toll booth, Bowlds' truck was standing on the road and at 5:36 a.m. the rig was still parked when they left and continued into Owensboro.

It appears that around 6 a.m. Knoblock and Harris arrived in Owensboro at the Holiday Inn. Harris then called the Owensboro Center and explained what had happened to Supervisor Buddy Ellis, and Knoblock testified he then called Bob Jones and explained to him what had happened, and that Jones then told Knoblock to let Bowlds punch out and to preserve his timecard, and they would meet later that day to decide what action would be taken. Jones also told Knoblock he would have Division Manager Jim Hatcher contact Acting Campbellsville Center Manager Neil Mulvaney with instructions to keep Perkins' timecard.

Jones testified that in accordance with the above, he telephoned Division Manager Jim Hatcher—whose

area included the Campbellsville Center—and told him to be sure to retain Perkins' timecard and log sheet for the day—that Hatcher left the phone, got Perkins' timecard and log sheet and gave the information to Jones on the telephone—that he then compared what Perkins put on his timecard and log sheet with the information Knoblock supplied, and in so doing realized there was a 17-minute discrepancy on the return leg rest break. Later that same day Jones asked Knoblock to meet him at the Campbellsville Center in order to suspend Perkins pending further investigation, and said that he also called West Division Manager Ben Cissell and told him to suspend Bowlds that night pending completion of the investigation.

The subsequent circumstances and events involving the actual suspensions and discharges and the grievance meetings in relation thereto, have been detailed previously herein.[16]

Final Conclusions

The answer by the Respondent raised as separate defenses the disposition of the Perkins' and Bowlds' grievances and requested the Board to defer its processes to these awards—the Respondent argues that with one exception, the decision of *Spielberg Mfg. Co.*, 112 NLRB 180 (1955) is applicable to the grievance

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[16] Jones testified that between August 28 and August 30, he personally reviewed Bowlds' and Perkins' timecards and log sheets for August 27-28, and compared these with the observations of Knoblock, Harris and Cash that date, and in so doing was convinced that both men had falsified their timecards and overextended their breaks and decided to discharge both men, and that he decided to handle the discharge of Perkins and directed Division Manager Ben Cissell to handle Bowlds' discharge.

awards in these cases. It is pointed out that since both Bowlds and Perkins amended their unfair labor practice charges to include a Section 8(a)(4) allegation, there could not be deferral to any award on that allegation, but Respondent argues this charge is so obviously specious that it should be dismissed, and absent such a charge, the *Spielberg* doctrine should be applied to these cases, and the Respondent then details the various grievance steps and meetings which were held in pursuant to the grievance procedures in the bargaining contract, as aforestated. Moreover, it is pointed out that Bowlds and Perkins pursued their grievances voluntarily through the procedures outlined in Article 5 of the contract between the parties and the decision of the Grievance Committee is as binding on Bowlds and Perkins as it is on the Respondent—that by filing their grievances under the contract, Bowlds and Perkins clearly agreed to the submission of their cases to the Grievance Committee and State Panel for decision, and that Bowlds submitted, and the Grievance Committee considered, nearly identical issues that are presented in this case—his "Union activities" and his participation in the class action lawsuit—as the bases of discrimination against him—that Union Agent Trenaman acknowledged that these issues had been presented at each level of the grievance procedure since they were specifically mentioned in Bowlds' written grievance, and admittedly Trenaman read the grievance aloud as part of the presentation at each step.[11]

Under the *Spielberg* doctrine, the Board defers to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed

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[11] See Respondent Exhibit No. 4.

to be bound, and the decision of the arbitration panel is not clearly repugnant to the Act. In the instant case, the concerted activities and union activities of Perkins and Bowlds were not brought up at any of the grievance joint meetings except in making a brief mention by reading references to such as part of the grievance language. Moreover, Union Agent Trenaman admitted that he never met with Bowlds or Perkins before the grievance joint panel meetings during the various steps of the grievance procedure, never went over their testimony with them, never introduced any evidence concerning their PROD or UP-Surge activities, their class action lawsuit (other than a reference to it in Bowlds' grievance), nor the fact that they had filed grievances under the grievance procedure, nor that they had testified in the earlier Board case (25-CA-10318). In the final analysis, the joint grievance committees and panels here involved did not consider the relevant facts pertaining to union and concerted activities of Bowlds and Perkins, in fact, were barely made aware of them. Accordingly, I am *not* persuaded that the instant complaint should be dismissed on *Spielberg* grounds.[12]

It is alleged that in March 1979 the Respondent maintained a rule prohibiting the distribution of UP-Surge material on the Respondent's property at any

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[12] In the earlier Board case involving Bowlds (25-CA-10318), as aforestated, Judge von Rohr, at one stage in the case, issued an Order recommending dismissal of his case on the grounds that the Board should defer to the arbitrator's ruling under the doctrine in *Spielberg*. However, in an interim appeal this Order was later reversed by the Board, and in its recent decision in this case—252 NLRB No. 145—the Board majority outlines in some details their reasons for rejecting *Spielberg* and in so doing reaffirms their previous conclusions that this earlier case was not appropriate for deferral to the arbitration award.

time, and that Supervisor Tom Mouser enforced such rule.

Supervisor Tom Mouser, terminal manager at Campbellsville, testified that no such rule has ever been posted, maintained or published. However, it is admitted that the Respondent promulgated its no-solicitation and no-distribution rule appearing on the employees' bulletin boards both at Campbellsville and at Owensboro, as outlined in General Counsel Exhibit No. 10.[13] The General Counsel argues that the above rule is too confining in its language, and therefore unlawful.

The reason why the Board holds unqualified restrictions against solicitation "in work areas" improper, is because they leave open the question whether the prohibition applies as well while employees are not working. In the instant case, there is credible evidence that Perkins was distributing UPSurge handbills at the terminal in February or March, 1979, when Supervisor Mouser inquired of Perkins if he had been distributing "some papers" around the

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[13] 1. NO EMPLOYEE SHALL SOLICIT OR PROMOTE SUPPORT FOR ANY CAUSE OR ORGANIZATION DURING HIS OR HER WORKING TIME OR DURING THE WORKING TIME OF THE EMPLOYEE OR EMPLOYEES AT WHOM SUCH ACTIVITY IS DIRECTED.

2. NO EMPLOYEE SHALL DISTRIBUTE OR CIRCULATE ANY WRITTEN OR PRINTED MATERIAL IN WORK AREAS AT ANY TIME, OR DURING HIS OR HER WORKING TIME OR DURING THE WORKING TIME OF THE EMPLOYEE OR EMPLOYEES AT WHOM SUCH ACTIVITY IS DIRECTED.

3. NO EMPLOYEE SHALL ENTER OR REMAIN IN THE BUILDING AND OTHER WORK AREAS FOR ANY PURPOSE EXCEPT TO REPORT FOR, BE PRESENT DURING, OR CONCLUDE HIS OR HER WORK SHIFT.

Campbellsville Center. Perkins replied in the affirmative and then told Mouser "we had a right to as long as the man wasn't on the clock working." Mouser answered, "Well, I'd rather you didn't do it." [14] Perkins then explained there was a notice or rule on the bulletin board which permitted the distributions of such leaflets.

While Perkins may have been correct in the overall application or interpretation of the rule in question—permitting the distribution of such material on non-work time—nevertheless, the rule did create an ambiguous situation so that employees did not clearly know what was permitted and what was prohibited, and, of course, Supervisor Mouser did nothing to clear up the matter or to lead employees to believe that they could distribute material on non-working time, as he informed Perkins that "I'd rather you didn't do it" after Perkins had stated that he was distributing on his own time. Moreover, the mere fact that the tone of the conversation may have been

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[14] Mouser denied that such a conversation took place, but I have credited Perkins, a convincing and straightforward witness, with the more logical recollection that such an incident did occur based upon background, general circumstances, and sequence of events. Moreover, it should be noted that all facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company*, 369 U.S. 404. As to those witnesses testifying in contradiction of the findings herein, their testimony heas been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. ***All testimony has been reviewed and weighed in the light of the entire record.***

friendly or conciliatory does not, of course, erase the implied restrictions by Mouser.

I find that by promulgating, maintaining, and enforcing this rule during February and March, 1979, the Respondent violated Section 8(a)(1) of the Act.

Counsel for Respondent points out that it should be emphasized that both Bowlds and Perkins were disciplined only because of their excessive breaks and falsified timecards on August 27-28—that although both drivers had been returning to their home terminals consistently late—this was not the reason for the discharge, that their habitual late returns and complaints from supervision alerted management to the fact that these drivers were extending their breaks or making unscheduled stops, without authority and without accurately marking their timecards. That it should also be noted that these two drivers were being paid for their extended breaks and unscheduled stops, since only the scheduled 15-minute rest break and the 30-minute lunch period are unpaid—that Bowlds and Perkins were stealing time from the Company and then falsifying the amounts taken on their timecards—that by extending their workday, returning beyond their scheduled return time, they received overtime payments since overtime is paid after 8 hours per day, and at the feeder driver rate of $11.61 for straight time hours, this translates to an overtime rate of $17.41 per hour, and that if Bowlds, for example, averaged 15 minutes late return to the Owensboro Center on each of his 5 workdays per week, that would amount to 1 hour and 15 minutes of additional overtime which must be paid to him—or $21.76 per week,[15] and that the delayed returns to the terminals not only cost additional overtime payments to the late-

[15] See General Counsel Exhibit No. 13a through s.

returning feeder driver, but also additional overtime payments to the package delivery drivers, who must wait for the feeder driver trailers to be unloaded and sorted. Campbellsville Center Manager Mouser explained the effect when a feeder driver such as Perkins returns late:

> "A. Well, it's kind of like a mushroom. If he's [Perkins] late then the delivery drivers are late getting out of the building, consequently they're late coming back into the building, and could be—consequently could be late, the feeder runs that leave that particular night.
>
> What this causes is it causes additional overtime for all my package drivers, and in fact since Perkins is not on schedule it causes additional overtime for him." (847, lines 18-25.)

It is further pointed out by Respondent that Bowlds acknowledged on cross-examination that he had been instructed to leave the Nashville terminal at 2:45 a.m. and be in Owensboro at 6 a.m., and Bowlds also acknowledged that he had been aware for some time that his rest break was not to exceed 15 minutes, and that Bowlds had been given a warning letter at an earlier time for taking more than his allotted 15-minute break, and was terminated in April 1978 for overextending his breaks and falsifying his timecard, and then reinstated with a suspension—that on August 4, 1978, he was terminated again for the same reason and then reinstated at the last step of the grievance procedure with a suspension and final warning.

The Respondent also points out that while Perkins was reinstated to his job by the State Grievance Panel without backpay, he engaged in the same misconduct—that his testimony was replete with inconsist-

encies, and his statement that the Campbellsville time-clock was running 10 minutes fast is just one illustration.

Turning now specifically to the late August 1979 suspension and discharge of Bowlds.

In essence, management is attempting to show that Bowlds stopped 24 miles on the Green River Parkway on his down leg (southbound trip) and without noting same on his timecard. However, Bowlds—a consistent and straightforward witness—credibly testified that on this occasion he stopped less than 10 minutes and did so to wake up and to relieve himself. There is ample evidence in this record to show that it is a common practice for drivers to stop from time to time to relieve themselves and to wake up by getting out of their truck.[16] There is also ample evidence in this record to show that under normal circumstances when drivers stop for a few minutes to relieve and for wake-up purposes—they do not make any notations of such on their timecards or in their logbooks,

---

[16] Supervisor George Knoblock was asked if he had seen Bowlds outside his truck on the occasion in question, and his replies were as follows:

A. He was outside of the vehicle, yes, sir.

Q. Was he walking around the tractor and trailer, or just standing there, or what?

A. He was standing.

Q. With regard to that. Are you aware that drivers do stop along the highway, either to relieve themselves, or wake themselves up, as a common practice?

A. To relieve themselves, yes.

Q. Uh huh. How about to wake themselves up, meaning if a man is sleepy in the middle of the night he'll walk around to—

Q. —get himself awake, or alert?

A. Yes.

and Bowlds also testified that such was the practice when he drove inspection or service runs with supervisors, as aforestated.[17]

In the final analysis, management is adding approximately 26 minutes to the southbound trip from Owensboro to Nashville (14 additional minutes on the Green River Parkway, 5 minutes at Amoco, and an additional 7 minutes at the Key Truck Stop), yet Bowlds admittedly arrived at the Nashville terminal at 12:18 a.m. on August 28.

It appears very doubtful to me that Bowlds would have arrived at Nashville when he did—if one adopts the observations of management and adds 26 minutes to his stops and rest breaks. It should be remembered that even when Bowlds drove his service checks with supervisors, and admittedly did not overstay or extend any break stops—he was still 6 or 7 minutes late, therefore on the occasion here in question, if he overextended his stops by a total of 26 minutes on the down leg—then, in all likelihood, he would have been considerably later on his arrival into Nashville.

On his return leg the Company adds at least 17 minutes (the break stop at Amoco with Perkins), yet Bowlds arrived back at Owensboro at about 6:15 a.m. Again, if Bowlds actually extended his stop by 17 minutes, it is unlikely he would have arrived at Owensboro when he did, and especially so since even by stopping the allotted time when supervisors performed service checks—he was still several minutes late. Moreover, the timecards for Bowlds in July and August, 1979, reveal that his normal driving time,

---

[17] As noted, I have also credited the testimony of Bowlds as to his other stops—where he stopped, the frequence of such stops, and the duration of his stops on the night and morning of August 27 and 28.

for the most part, from Owensboro to Nashville and return, was 3 hours and 20 minutes (each way), and on the night and morning here in question—Bowlds was still very close to his normal 3 hours and 20 minutes—and which would have been very difficult to achieve with the additional stops and durations suggested by management.[18]

It is also evident to me that Bowlds was singled out as the subject of rather extraordinary surveillance activity by Respondent supervisors at a time when he was known to be engaged in protected concerted activities.[19] In this regard Supervisor Cash decided to follow Bowlds after Knoblock had informed him that he (Knoblock) was going to follow Perkins, and then rather extensive travel plans and arrangements were made in order to conduct these surveillance exercises, as aforestated. In any event, I find it difficult to believe that, absent some outside motion, management would go to such lengths in following Bowlds without even first having discussed his alleged late arrivals directly with him, and/or with the supervisor of the Owensboro facility, Thomas Campbell.

It also appears to me that while the Company makes considerable attempts to have the feeder drivers arrive at their destinations on time and that

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[18] I will discuss further aspects of the Amoco stop in the section dealing with Perkins.

[19] As detailed earlier herein, Bowlds distributed UPSurge and PROD materials at the terminal in Owensboro, was a union member of Local 89 and a union steward handling several grievances each month, up to the present has not indicated any withdrawal in participation with the filing of a civil suit against Respondent in a U.S. District Court, and has filed charges with the Board and given testimony in a prior case against the Respondent tried during April, May and September, 1979 (25-CA-10318).

prompt arrivals are important to them—nevertheless, exact "punctuality" is not as paramount as it would seem to be. In March and May, 1979, Supervisor Cash performed service checks on Bowlds, as aforestated, and on these occasions Bowlds was 4 to 8 minutes late (both directions) but nothing was said about it nor were any real corrective measures instituted—Cash merely informed Bowlds that he should go faster on the down hills. Moreover, punctuality and exact arriving times also receives another back seat in Respondent's argument where it is emphasized that excessive breaks and falsified timecards were the reasons for the discharges, and late returns or arrivals at terminals merely alerted management that Bowlds was extending breaks and making unscheduled stops without authority and without accurately marking his timecard.

In summary, the evidence in this record shows that Respondent built up Bowlds' entitled and authorized breaks on the night and morning of August 27-28, to 43 additional minutes by announcing non-break toilet stops, by announcing a non-existent southbound stop at Amoco, and by alleging overextensions at the coffeehouses (Key Stop and Amoco Stop), all contrary to the graveyard shift managers of the coffeehouses as well as Bowlds' and Perkins' testimony. Additionally, as also pointed out, Supervisor Cash testified that Bowlds had a bad late-arrival record at the home terminal at Owensboro, but when analyzed the record shows that Bowlds had a satisfactory record—a steady 3 hours and 20 minutes record of driving, and with only a few minutes extra on occasions where fog or an accident held him up.

Turning now to the suspension and discharge of Perkins. His scheduled feeder run required him to

leave Campbellsville at 10:14 p.m., after he started work at 9:55 p.m. His initial designation was the Nashville hub at 1:32 a.m. From that time until 3:25 a.m., when he was scheduled to depart, he was allowed a 30-minute lunch break, and then was required to shift cars, hook to a new trailer, and refuel. On the down leg to Nashville, Perkins was allowed a 15-minute break plus 5 minutes to safety check his vehicle and update his logbook. Once the safety inspection is complete and he leaves his truck, his 15-minute break begins. Perkins was scheduled to leave the Nashville hub no later than 3:45 a.m. headed toward Bowling Green, Kentucky, but before his arrival there, he was allowed another 15-minute break. It appears that his normal scheduled arrival at the Bowling Green Center was 5:36 a.m., where he dropped his Nashville trailer, hooked up to another trailer, performed a pre-trip safety inspection, and then headed for the Campbellsville Center. His arrival at Campbellsville was 7:41 Eastern time.

The Respondent points out and argues that Perkins had been frequently instructed about the specific schedule times of his feeder run—that in 1978 Feeder Supervisor Wayne Pruitt "stressed heavily" to Perkins that he was to leave the gate at Nashville no later than 3:45 a.m. It is also pointed out that the packages which Perkins returns to Campbellsville are immediately sorted and pre-loaded on package delivery cars which are then dispatched within 1 hour of Perkins' return for delivery, and any delay in Perkins' return to Campbellsville caused a delay in the pre-load and dispatch of the package cars.

The only real controversy as to Perkins involves his stop at the Amoco Truck Stop on his return trip. Perkins stated that he was there for 15 minutes on

his break, while the Company maintains he and Bowlds stayed 32 minutes.

Counsel for Respondent points out that in his testimony Perkins stated that on the morning of August 28, he arrived at the Amoco Truck Stop at 3:58 a.m., Central time, because he looked at his watch, but in an affidavit given to the NLRB on October 3, Perkins stated that he and Bowlds arrived at the Amoco Truck Stop at 4 a.m., Central time. Further that Perkins recited in his affidavit he knew it was 4 a.m. because he glanced at his watch, but when confronted with the inconsistency, Perkins selected the 3:58 a.m., Central time, he had testified about. Respondent argues that neither version conforms to *Bowlds'* timecard for his August 28 rest break at Amoco which he indicates started at 3:56 a.m., and thus Bowlds' timecard reflects that he started his break at least 2 minutes before Perkins pulled in the Amoco parking lot. Moreover, argues the Respondent, Bowlds claims that he and Perkins entered the restaurant and sat together in a booth for their break until they both left the restaurant at 4:11 a.m. (Bowlds entered these times on his timecard), while Perkins testified that they began their break at 4:05 a.m. and finished at 4:20 a.m., Central time, and so marked his timecard. Respondent argues that neither version is accurate as both of them overextended their breaks and falsified the times on their timecards.

While there are some discrepancies in the timecards of Bowlds and Perkins as to when their breaks actually started and ended at the Amoco Truck Stop on the morning of August 28, nevertheless, it appears to me that such discrepancies must be deemed of a minor nature when considering the fact that drivers were permitted a 5-minute interval or leeway at

breaktime to bring their logbooks up to date which Perkins did, and the recognized fact that watches and clocks will occasionally vary at least a few minutes one way or another as is evident with the clock at Campbellsville. However, and more importantly, the oral testimony given by Perkins (and Bowlds) on the times they arrived and left the Amoco Truck Stop on August 28, are in *substantial* agreement with the times noted on their timecards, and this is so even though their testimony at the trial before me was given almost 8 months later.

In consideration of the overall circumstances involving Perkins, it must also be remembered that his arrival time back in Campbellsville had been changed in early 1979 from 8:05 to 7:55 a.m., as aforestated, and Perkins admitted that thereafter, on the average, he was late by 5 to 10 minutes in getting back, but he explained to Supervisor Tom Mouser this was due to being late getting out of Bowling Green or Nashville. Moreover, that when Supervisor George Knoblock talked to him in August 1979 about being late, he then informed Knoblock that he would "always be late" in getting back to Campbellsville as the clock there was running 10 minutes fast. It is also noted that the Respondent had assigned no particular or specific hardships in their operations even though Perkins was running late in his arrivals back at Campbellsville. There is no testimony that the packages did not get out on the connecting trucks or feeders.

It is evident to me that Perkins was also singled out as the subject of extraordinary surveillance by supervisors at a time when he was known to be engaged in protected concerted activities—Perkins had testified in the earlier case (25-CA-10318) involving Bowlds, he had distributed UPSurge handbills in early

1979 in the presence of Supervisor Mouser and had been told not to do it, he had also at one time distributed PROD at the terminal in Campbellsville, he had collected money and signatures at Campbellsville for the class action civil suit, as aforestated, and Perkins had also filed grievances against the Respondent. In addition to the above, it is again noted, that on or about February 28, 1979, Perkins had requested of management additional trousers or pants to complete his uniform, and in reply to this request Supervisor Mouser told Perkins that they were "trying to figure out a way to fire your ass anyway. We don't have to get you any."

In summary, the evidence in this record shows that Respondent attempted to add on 17 minutes as an overextension to Perkins' break stop, but the credited testimony by Perkins and others reveals that his break at the Amoco Truck Stop was within the allotted time, and such notation on his timecard was substantially corroborated by his oral testimony.

In the instant case, I have found that the General Counsel made a *prima facie* showing sufficient to support the inference that protected conduct was the motivating factor in the suspensions and discharges of Bowlds and Perkins, and in my view the Respondent has failed to demonstrate that such actions would have taken place in the absence of the protected conduct. In accordance therewith, the Respondent is in violation of Section 8(a)(1), (3) and (4) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirma-

tive action designed to effectuate the policies of the Act.

It having been found that the Respondent discriminatorily suspended and discharged Robert Bowlds and David Perkins, I shall recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent position, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment of a sum of money equal to that which he would have normally earned from the date of Respondent's discrimination, less net earnings, during said period. All backpay provided herein shall be computed with interest on a quarterly basis, in the manner described by the Board in *F.W. Woolworth Company*, 90 NLRB 289, and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB No. 117.[20]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in section III above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3) and (4) of the Act.

Upon the foregoing findings of fact and the entire

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[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

United Parcel Service, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and enforcing a no-distribution rule, prohibiting distribution of union materials on Company property at any time.

(b) Suspending and discharging employees because they engage in concerted activity for their mutual aid or protection, and/or because of their testimony in a Board proceeding.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Robert Bowlds and David Perkins immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to a substantially equivalent position, and make them whole for any loss of pay and other benefits in the manner set forth in the Remedy section.

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[21] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Owensboro and Campbellsville, copies of the attached notice marked "Appendix."[22] Copies of said notices, on forms to be provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. October 30, 1980.

/s/ Phil W. Saunders
PHIL W. SAUNDERS
Administrative Judge

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[22] In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD-635-80

FORM NLRB-4727
(9-69)

[SEAL] [SEAL]

APPENDIX

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT promulgate, maintain or enforce a no-distribution rule prohibiting distribution of union literature or materials on Company property at any time.

WE WILL NOT discriminate against our employees because they gave testimony in a Board proceeding.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees in violation of the rights guaranteed them under the Act.

WE WILL NOT discourage membership in Teamsters Local 710 or Teamsters Local 89, or any other labor organization, by discriminating against our employees in regard to their hire and tenure of employment or any terms or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them under the Act.

WE WILL offer to Robert Bowlds and David Perkins reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits plus interest.

WE WILL expunge from our files any references to the disciplinary suspension of Bowlds and Perkins issued on August 28, 1979, and to their subsequent discharges, and notify them in writing that this has been done.

UNITED PARCEL SERVICE, INC.

.....

(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Bldg., Rm. 232, 575 North Pennsylvania Street, Indianapolis, IN 46204 (Telephone No. 317—269-7413)

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CLERK

No. 83-453

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

UNITED PARCEL SERVICE, INC.,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF UNITED PARCEL SERVICE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This case arose in 1979 from the decision of Respondent, United Parcel Service, Inc. ("UPS"), to discharge two employees, Robert W. Bowlds and David E. Perkins. Bowlds and Perkins subsequently filed charges with Petitioner, National Labor Relations Board ("NLRB" or "Board"), in which they alleged that they had been terminated for engaging in conduct protected by the National Labor Relations Act ("Act"). The Regional Director issued a complaint, and the matter was tried before Administrative Law Judge Phil W. Saunders ("the ALJ"). Throughout the trial, UPS maintained that the discharges had nothing to do with activities protected by the Act, and that the employees had been terminated for overstaying breaks and falsifying timecards. (A. 62a-67a).[1]

On October 30, 1980, the ALJ issued an Opinion which concluded that the discharges of Bowlds and Perkins violated §§ 8(a)(1), (3), and (4) of the Act. The Board adopted the ALJ's Opinion on May 21, 1982 and ordered that Bowlds and Perkins be reinstated with back pay.[2] The Court of Appeals refused to enforce the Order on the ground that the NLRB had misallocated the burden of proof. (A. 24a-26a). The case was remanded for further consideration. (A. 26a).

REASONS FOR DENYING THE WRIT

The instant Petition rests on only one argument. According to the Board, this Court's decision in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983), conclusively demonstrates that the Court of Appeals erred and that this case should be summarily reversed. The NLRB's position is funda-

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1. All citations so designated are to the Appendix attached to the NLRB's Petition for Certiorari.

2. Although the NLRB made several modifications in the ALJ's Opinion, none concerned the issues relevant to this Petition. UPS has filed a separate Petition for Certiorari, No. 83-71, which seeks review of the NLRB's refusal to defer to the findings of joint grievance panels which upheld the discharges of Bowlds and Perkins. Another issue that once was in the case, concerning the distribution of literature at a UPS facility, is no longer contested.

mentally flawed, because *Transportation Management* is not directly on point, and the matter must be reviewed by the Board to determine how this Court's decision should be applied to these facts.

Transportation Management upheld the Board's test for apportioning the burden of proof in "dual motive" cases, *i.e.*, situations in which discrimination under the Act was a "motivating factor" in the penalizing of an employee, but the employer contends that the identical penalty would have been imposed for legitimate reasons absent the discrimination.[3] The proper analysis is two-pronged. First, the General Counsel has the "burden of proving" all the "elements" of the unfair labor practice. 103 S.Ct. at 2474. Second, if this burden is carried, the employer may "avoid being adjudicated a violator by showing what his actions would have been regardless of the forbidden motivation." This latter type of argument is essentially an "affirmative defense," with the employer bearing the burden of persuasion. *Id.*

It must be emphasized that under *Transportation Management*, the burden of persuasion does not "shift" to the employer *until* General Counsel has *proven* that discrimination under the Act motivated the adverse action against the employee. This point was made explicitly in the following passage:

> . . . The Board held that the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 [of the Act] was a substantial or a motivating factor in the discharge. Even if this was the case, *and the employer failed to rebut it*, the employer can avoid being held in violation of §§ 8(a)(1), and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event.

103 S.Ct. at 2473 (emphasis added, footnote omitted). Thus, the burden of persuasion remains with General Counsel until the

---

3. This test was first applied in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

employer has "failed to rebut" the Board's proof of discrimination under the Act. As the *Transportation Management* opinion explained in footnote 5, "The Board has not purported to shift the burden of persuasion on the question of whether the employer fired [the employee] at least in part because he engaged in protected activities." 103 S.Ct. at 2473 n.5.

In this case, the ALJ and NLRB did not follow the *Transportation Management* roadmap. The ALJ stated:

> In the instant case, I have found that the General Counsel made a *prima facie* showing sufficient to support the inference that protected conduct was the motivating factor in the suspension and discharges of Bowlds and Perkins, and in my view the Respondent has failed to demonstrate that such actions would have taken place in the absence of the protected conduct. In accordance therewith, the Respondent is in violation of Sections 8(a)(1), (3), and (4) of the Act.

(A. 81a) (emphasis in original).

The text of the ALJ's Opinion graphically demonstrates that he did not require General Counsel to *prove* by a preponderance of the evidence that UPS was motivated by discrimination under the Act when it discharged Bowlds and Perkins. To the contrary, the ALJ and NLRB relieved General Counsel of the burden of persuasion as soon as he established a mere *prima facie* inference of illegal discrimination. Therefore, when UPS attempted to rebut the *prima facie* case of discrimination, its evidence was judged under the wrong burden of proof.

The instant case is actually controlled by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, a Title VII case, the Supreme Court held that the plaintiff bears the burden of proof in convincing the trier of fact that the defendant intentionally discriminated against the plaintiff. 450 U.S. at 253. *Transportation Management* distinguished *Burdine* on its facts, because the later case involved the burden of persuasion *after* it is established that illegal discrimination was a motivating factor in the penalty imposed upon an employee. *Transportation Management*, however, also indicated that *Bur-*

dine remains good law and is applicable in the context of unfair labor practice cases before the Board when the facts are apposite. 103 S.Ct. at 2473 n.5. This case is controlled by *Burdine*, because the ongoing controversy is whether discrimination was a motivating factor in the discharges, not whether the discharges would have occurred in the absence of discrimination. Significantly, the Court of Appeals in this case explicitly relied on *Burdine* in finding that the NLRB misapplied the burden of proof. (A. 22-24a). As the ALJ and NLRB plainly violated *Burdine* by prematurely relieving General Counsel of the burden of persuasion, the Board's attack on the decision of the Court of Appeals has no merit.

This case cannot be resolved until the *Transportation Management* analysis is implemented properly. The NLRB should be given an opportunity to apply the appropriate burden of proof and to develop an administrative record. It would disserve the interest of judicial economy for this Court to grant certiorari in this case where, due to a unique procedural error, the ALJ and the NLRB failed to apply the Board's own burden of proof. Since either the NLRB or this Court must review the record in this case, and since additional evidence, or at least additional findings of fact are needed, there is no reason for this Court to review the remand order despite the intervening change in the law.

CONCLUSION

In light of the foregoing, UPS requests that this petition be denied.

Respectfully submitted

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Dated: October 17, 1983

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CLERK

No. 83-453

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-453

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent urges that the petition for a writ of certiorari in this case should be denied, so that the Board may reconsider the case. That suggestion should be rejected.

Respondent does not deny that the court of appeals concluded (see Pet. App. 24a-26a) that this case should be remanded to the Board because it disagreed with the Board's allocation of the burden of proof in dual motive cases, set out in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). This Court subsequently upheld the Board's *Wright Line* allocation in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983). The court of appeals should have an opportunity to reevaluate whether a remand to the Board is still appropriate in light of *Transportation Management*.

It is therefore respectfully submitted that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of the Court's decision in *NLRB* v. *Transportation Management Corp.*[1]

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[1]The Court has followed this procedure in cases in which we filed protective petitions pending the Court's decision in *NLRB* v. *Transportation Management Corp.* See *NLRB* v. *Behring International, Inc.*, No. 82-438 (June 20, 1983); *NLRB* v. *Heartland Food Warehouse*, No. 82-736 (June 20, 1983); *NLRB* v. *Blackstone Co.*, No. 82-1105 (June 20, 1983); *NLRB* v. *New York University Medical Center*, No. 82-1705 (Oct. 3, 1983).

Respondent has petitioned for a writ of certiorari on another issue raised by the decision below (No. 83-71). On October 20, 1983, we filed our brief in opposition in No. 83-71.

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